Opinions of Court of Appeals

United States Court of Appeals for the Fourth Circuit

No. 14552

PECOLA ANNETTE WRIGHT, ET AL., APPELLEES

v.

COUNCIL OF THE CITY OF EMPORIA AND THE MEMBERS THEREOF, AND SCHOOL BOARD OF THE CITY OF EMPORIA AND THE MEMBERS THEREOF, APPELLANTS

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond

ROBERT R. MERHIGE, JR., District Judge

Argued October 8, 1970—Decided March 23, 1971

Before HAYNSWORTH, Chief Judge, BOREMAN, BRYAN, WINTER, and CRAVEN, Circuit Judges sitting en banc*

John F. Kay, Jr., and *D. Dortch Warriner* (*Warriner, Outten, Slagle & Barrett;* and *Mays, Valentine, Davenport & Moore* on brief) for Appellants, and *S. W. Tucker* (*Henry L. Marsh, III*, and *Hill, Tucker & Marsh;* and *Jack Greenberg, James M. Nabrit, III*, and *Norman Chachkin* on brief) for Appellees.

CRAVEN, *Circuit Judge:* In this case and two others now under submission en banc we must determine the extent of the power of state government to

*Judge Sobeloff did not participate. Judge Butzner disqualified himself because he participated as a district judge in an earlier stage of this case.

redesign the geographic boundaries of school districts.[1] Ordinarily, it would seem to be plenary but in school districts with a history of racial segregation enforced through state action, close scrutiny is required to assure there has not been gerrymandering for the purpose of perpetuating invidious discrimination.

Each of these cases involve a county school district in which there is a substantial majority of black students out of which was carved a new school district comprised of a city or a city plus an area surrounding the city. In each case, the resident students of the new city unit are approximately 50 percent black and 50 percent white. In each case, the district court enjoined the establishment of the new school district. In this case, we reverse.

I

If legislation creating a new school district produces a shift in the racial balance which is great enough to support an inference that the purpose of the legislation is to perpetuate segregation, and the district judge draws the inference, the enactment falls under the Fourteenth Amendment and the establishment of such a new school district must be enjoined. See *Gomillion* v. *Lightfoot*, 364 U.S. 399 (1960). Cf. *Haney* v. *County Board of Education of Sevier County*, 410 F. 2d 920 (8th Cir. 1969); *Burleson* v. *County Board of Election Commissioners of Jefferson County*, 308 F. Supp. 352 (E.D. Ark.) aff'd — F. 2d —, No. 20228 (8th Cir. Nov. 18, 1970). But where the shift is merely a modification of the racial ratio rather than effective resegregation the problem becomes more difficult.

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[1] The other two cases are *United States* v. *Scotland Neck City Board of Education*, — F. 2d —, Nos. 14929 and 14930 (4th Cir. —, 1971) and *Turner* v. *Littleton-Lake Gaston School District*, — F. 2d —, No. 14990 (4th Cir. —, 1971).

The creation of new school districts may be desirable and/or necessary to promote the legitimate state interest of providing quality education for the state's children. The refusal to allow the creation of any new school districts where there is any change in the racial makeup of the school districts could seriously impair the state's ability to achieve this goal. At the same time, the history of school integration is replete with numerous examples of actions by state officials to impede the mandate of *Brown* v. *Board of Education*, 349 U.S. 294 (1955) (*Brown II*). There is serious danger that the creation of new school districts may prove to be yet another method to obstruct the transition from racially separated school systems to school systems in which no child is denied the right to attend a school on the basis of race. Determining into which of these two categories a particular case fits requires a careful analysis of the facts of each case to discern the dominant purpose of boundary realignment. If the creation of a new school district is designed to further the aim of providing quality education and is attended secondarily by a modification of the racial balance, short of resegregation, the federal courts should not interfere. If, however, the primary purpose for creating a new school district is to retain as much of separation of the races as possible, the state has violated its affirmative constitutional duty to end state supported school segregation. The test is much easier to state than it is to apply.

II

Emporia became a city of the so-called second class on July 31, 1967, pursuant to a statutory procedure established at least as early as 1892. See 3 Va. Code § 15.1-978 to -998 (1950); Acts of the Assembly 1891-92, ch. 595. Prior to that time it was an incorporated

town and as such was part of Greensville County. At the time city status was attained Greensville County was operating public schools under a freedom of choice plan approved by the district court, and *Green* v. *County School Board of New Kent County,* 391 U.S. 430 (1968), invalidating freedom of choice unless it "worked," could not have been anticipated by Emporia, and indeed, was not envisioned by this court. *Bowman* v. *County School Board of Charles City County,* 382 F. 2d 326 (4th Cir. 1967). The record does not suggest that Emporia chose to become a city in order to prevent or diminish integration. Instead, the motivation appears to have been an unfair allocation of tax revenues by county officials.

One of the duties imposed on Emporia by the Virginia statutes as a city of the second class was to establish a school board to supervise the public education of the city's children. Under the Virginia statutes, Emporia had the option of operating its own school system or to work out one of a number of alternatives under which its children would continue to attend school jointly with the county children. Emporia considered operating a separate school system but decided it would not be practical to do so immediately at the time of its independence. There was an effort to work out some form of joint operation with the Greensville County schools in which decision making power would be shared. The county refused. Emporia finally signed a contract with the county on April 10, 1968, under which the city school children would attend schools operated by the Greensville County School Board in exchange for a percentage of the school system's operating cost. Emporia agreed to this form of operation only when given an ultimatum by the county in March 1968 that it would stop educating the city children mid-term unless some agreement was reached.

At the same time that the county was engaged in its controversy with Emporia about the means of educating the city children, the county was also engaged in a controversy over the elimination of racial segregation in the county schools. Until sometime in 1968, Greensville County operated under a freedom of choice plan. At that time the plaintiffs in this action successfully urged upon the district court that the freedom of choice plan did not operate to disestablish the previously existing dual school system and thus was inadequate under *Green* v. *County School Board of New Kent County, supra.* After considering various alternatives, the district court, in an order dated June 25, 1969, paired all the schools in Greensville County.

Also in June 1969, Emporia was notified for the first time by counsel that in all probability its contract with the county for the education of the city children was void under state law. The city then filed an action in the state courts to have the contract declared void and notified the county that it was ending its contractual relationship forthwith. Parents of city school children were notified that their children would attend a city school system. On August 1, 1969, the plaintiffs filed a supplemental complaint seeking an injunction against the City Council and the City School Board to prevent the establishment of a separate school district. A preliminary injunction against the operation of a separate system was issued on August 8, 1969. The temporary injunction was made permanent on March 3, 1969.[2]

The Emporia city unit would not be a white island in an otherwise heavily black county. In fact, even in

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[2] The decision of the court below is reported as *Wright* v. *County School Board of Greensville County*, 309 F. Supp. 671 (E.D. Va. 1970).

Emporia there will be a majority of black students in the public schools, 52 percent black to 48 percent white. Under the plan presented by Emporia to the district court, all of the students living within the city boundaries would attend a single high school and a single grade school. At the high school there would be a slight white majority, 48 percent black and 52 percent white, while in the grade school there would be a slight black majority, 54 percent black and 46 percent white. The city limits of Emporia provide a natural geographic boundary for a school district.

The student population of the Greensville County School District without the separation of the city unit is 66 percent black and 34 percent white. The students remaining in the geographic jurisdiction of the county unit after the separation would be 72 percent black and 28 percent white. Thus, the separation of the Emporia students would create a shift of the racial balance in the remaining county unit of 6 percent. Regardless of whether the city students attend a separate school system, there will be a substantial majority of black students in the county system.

Not only does the effect of the separation not demonstrate that the primary purpose of the separation was to perpetuate segregation, but there is strong evidence to the contrary. Indeed, the district court found that Emporia officials had other purposes in mind. Emporia hired Dr. Neil H. Tracey, a professor of education at the University of North Carolina, to evaluate the plan adopted by the district court for Greensville County and compare it with Emporia's proposal for its own school system. Dr. Tracey said his studies were made with the understanding that it was not the intent of the city to resegregate. He testified that the plan adopted for Greensville County would require additional expenditures for transpor-

tation and that an examination of the proposed budget for the Greensville County Schools indicated that not only would the additional expenditures not be forthcoming but that the budget increase over the previous year would not even keep up with increased costs due to inflation. Emporia on the other hand proposed increased revenues to increase the quality of education for its students and in Dr. Tracey's opinion the proposed Emporia system would be educationally superior to the Greensville system. Emporia proposed lower student teacher ratios, increased per pupil expenditures, health services, adult education, and the addition of a kindergarten program.

In sum, Emporia's position, referred to by the district court as "uncontradicted," was that effective integration of the schools in the whole county would require increased expenditures in order to preserve education quality, that the county officials were unwilling to provide the necessary funds, and that therefore the city would accept the burden of educating the city children. In this context, it is important to note the unusual nature of the organization of city and county governments in Virginia. Cities and counties are completely independent, both politically and geographically. See *City of Richmond* v. *County Board*, 199 Va. 679, 684 (1958); *Murray* v. *Roanoke*, 192 Va. 321, 324 (1951). When Emporia was a town, it was politically part of the county and the people of Emporia were able to elect representatives to the county board of supervisors. When Emporia became a city, it was completely separated from the county and no longer has any representation on the county board. In order for Emporia to achieve an increase in school expenditures for city schools it would have to obtain the approval of the Greensville County Board of

Supervisors whose constituents do not include city residents.

Determining what is desirable or necessary in terms of funding for quality education is the responsibility of state and school district officers and is not for our determination. The question that the federal courts must decide is, rather, what is the primary purpose of the proposed action of the state officials. See *Developments in the Law—Equal Protection*, 82 Harv. L. Rev. 1065 (1969). Is the primary purpose a benign one or is the claimed benign purpose merely a cover-up for racial discrimination? The district court must, of course, consider evidence about the need for and efficacy of the proposed action to determine the good faith of the state officials' claim of benign purpose. In this case, the court did so and found explicitly that "[t]he city clearly contemplates a superior quality education program. It is anticipated that the cost will be such as to require higher tax payments by city residents." 309 F. Supp. at 674. Notably, there was no finding of discriminatory purpose, and instead the court noted its satisfaction that the city would, if permitted, operate its own system on a unitary basis.

We think the district court's injunction against the operation of a separate school district for the City of Emporia was improvidently entered and unnecessarily sacrifices legitimate and benign educational improvement. In his commendable concern to prevent resegregation—under whatever guise—the district judge momentarily overlooked, we think, his broad discretion in approving equitable remedies and the practical flexibility recommended by *Brown II* in reconciling public and private needs. We reverse the judgment of the district court and remand with instructions to dissolve the injunction.

Because of the possibility that Emporia might institute a plan for transferring students into the city system from the county system resulting in resegregation,[3] or that the hiring of teachers to serve the Emporia school system might result in segregated faculties, the district court is directed to retain jurisdiction.

Reversed and remanded.

SOBELOFF, *Senior Circuit Judge,* with whom WINTER, *Circuit Judge,* joins, dissenting and concurring specially: In respect to Nos. 14929 and 14930, *United States* v. *Scotland Neck City Board of Education,* — F. 2d — (4th Cir. 1971), and No. 14990, *Turner* v. *Littleton-Lake Gaston School District,* — F. 2d — (4th Cir. 1971), the two cases in which I participated, I dissent from the court's reversal in *Scotland Neck* and concur in its affirmance in *Littleton-Lake Gaston.* I would affirm the District Court in each of those cases. I join in Judge Winter's opinion, and since he has treated the facts analytically and in detail, I find it unnecessary to repeat them except as required in the course of discussion. Not having participated in No. 14552, *Wright* v. *Council of City of Emporia,* — F. 2d — (4th Cir. 1971), I do not vote on that appeal, although the views set forth below necessarily reflect on that decision as well, since the principles enunciated by the majority in that case are held to govern the legal issue common to all three of these school cases.

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[3] A notice of August 31, 1969, invited applications from the county. Subsequently, the city assured the district court it would not entertain such applications without court permission.

I

The history of the evasive tactics pursued by white communities to avoid the mandate of *Brown* v. *Board of Education*, 349 U.S. 294 (1955), is well documented. These have ranged from outright nullification by means of massive resistance laws [1] and open and occasionally violent defiance,[2] through discretionary pupil assignment laws [3] and public tuition grants in support of private segregated schools,[4] to token integration plans parading under the banner "freedom-

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[1] *See Duckworth* v. *James*, 267 F. 2d 224 (4th Cir. 1959); *Bush* v. *Orleans Parish School Bd.*, 188 F. Supp. 916 (E.D. La. 1960), *aff'd per curiam*, 365 U.S. 569 (1961); *Bush* v. *Orleans Parish School Bd.*, 187 F. Supp. 42 (E.D. La. 1960), *aff'd Per curiam*, 365 U.S. 569 (1961); *Aaron* v. *McKinley*, 173 F. Supp. 944 (E.D. Ark. 1959); *aff'd sub nom.*, *Faubus* v. *Aaron*, 361 U.S. 197 (1959); *James* v. *Almond*, 170 F. Supp. 331 (E.D. Va. 1959), *app. dis.*, 359 U.S. 1006 (1959); *Harrison* v. *Day*, 200 Va. 439, 106 S.E. 2d 636 (1959) (decided the same day as *James* v. *Almond*, *supra*).

[2] *See Cooper* v. *Aaron*, 358 U.S. 1 (1958); *Armstrong* v. *Board of Education of City of Birmingham, Ala.*, 323 F. 2d 333 (5th Cir. 1963), *cert. denied sub nom.*, *Gibson* v. *Harris*, 376 U.S. 908 (1964); *Brewer* v. *Hoxie School District No. 46*, 238 F. 2d 91 (8th Cir. 1956); *Holmes* v. *Danner*, 191 F. Supp. 39[illegible] (M.D. Ga. 1961), *stay denied*, 364 U.S. 939 (1961).

[3] *See Northcross* v. *Board of Education of City of Memphis*, 302 F. 2d 818 (6th Cir. 1962); *Manning* v. *Board of Public Instruction*, 277 F. 2d 370 (5th Cir. 1960); *Gibson* v. *Board of Public Instruction, Dade County, Fla.*, 272 F. 2d 763 (5th Cir. 1959); *Orleans Parish School Board* v. *Bush*, 242 F. 2d 156 (5th Cir. 1957); *United States Commission on Civil Rights, Civil Rights USA—Public Schools, Southern States*, 2–17 (1962).

[4] *See Griffin* v. *County School Board of Prince Edward County*, 377 U.S. 218 (1964); *Hall* v. *St. Helena Parish School Board*, 197 F. Supp. 649 (E.D. La. 1961, *aff'd*, 368 U.S. 515 (1962).

of-choice."[5] One by one these devices have been condemned by the Supreme Court:

> [T]he constitutional rights of children not to be discriminated against in school admission on grounds of race or color declared by this Court in the *Brown* case can neither be nullified openly and directly by state legislators or state executive or judicial officers, nor nullified indirectly by them through evasive schemes for segregation whether attempted "ingeniously or ingenuously." *Cooper* v. *Aaron*. 358 U.S. 1, 17 (1958).

Neither these agencies, nor school boards, nor local communities have the right to put roadblocks in the way of effective integration. The Court has declared that "the obligation of every school district is to terminate dual school systems at once and to operate now and hereafter only unitary schools." *Alexander* v. *Holmes County Board of Education*, 396 U.S. 19, 20 (1969).

Today, I fear, we behold the emergence of a further stratagem—the carving out of new school districts in order to achieve racial compositions more acceptable to the white community. The majority frankly acknowledges the "serious danger that the creation of new school districts may prove to be yet another method to obstruct the transition from racially separate school systems to school systems in which no child is denied the right to attend a school on the basis of race," *Emporia, supra* at 4. However, the court fashions a new and entirely inappropriate doctrine to avert that danger. It directs District Courts to weigh and assess the various purposes that may have moved

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[5] *See Green* v. *County School Board*, 391 U.S. 430. (1968); *Raney* v. *Board of Education*. 391 U.S. 443 (1968); *Monroe* v. *Board of Commissioners*, 391 U.S. 450 (1968).

the proponents of the new school district, with the objective of determining which purpose is dominant. District Courts are told to intercede *only* if they find that racial considerations were the *primary* purpose in the creation of the new school units.[6] I find no precedent for this test and it is neither broad enough nor rigorous enough to fulfill the Constitution's mandate. Moreover, it cannot succeed in attaining even its intended reach, since resistant white enclaves will quickly learn how to structure a proper record—shrill with protestations of good intent, all consideration of racial factors muted beyond the range of the court's ears.[7]

If challenged state action has a racially discriminatory effect, it violates the equal protection clause unless a compelling and overriding legitimate state interest is demonstrated. This test is more easily applied, more fully implements the prohibition of the Fourteenth Amendment and has already gained firm root in the law. The Supreme Court has explicitly applied this test to state criminal statutes which on their face establish racial classifications. In 1964, striking down a Florida criminal statute which forbade a man and woman of different races to "habitually live in and occupy in the nighttime the same room," the Court stated in an opinion written by Justice White:

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[6] The majority's test as stated in *Emporia*, *supra*, is as follows: "Is the primary purpose a benign one or is the claimed benign purpose merely a cover-up for racial discrimination?"

[7] The impracticability of the majority's test is highlighted by the dilemma in which the District Judges found themselves in *Scotland Neck:* "In ascertaining such a subjective factor as motivation and intent, it is of course impossible for this Court to accurately state what proportion each of the above reasons played in the minds of the proponents of the bill, the legislators or the voters of Scotland Neck * * *. *United States* v. *Halifax County Board of Education*, 314 F. Supp. 65, 72 (E.D.N.C. 1970)."

> Normally, the widest discretion is allowed the legislative judgment * * *; and normally that judgment is given the benefit of every conceivable circumstance which might suffice to characterize the classification as reasonable rather than arbitrary and invidious. [Citations] But we deal here with a classification based upon the race of the participants, which must be viewed in light of the historical fact that the central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the States. This strong policy renders racial classifications "constitutionally suspect," *Bolling* v. *Sharpe,* 347 U.S. 497, 499; and subject to the most "rigid scrutiny," *Korematsu* v. *United States,* 323 U.S. 214, 216; and "in most circumstances irrelevant" to any constitutionally acceptable legislative purpose, *Hirabayashi* v. *United States,* 320 U.S. 810, 100.

McLaughlin v. *Florida,* 379 U.S. 184, 191–92 (1964). Thus, the Court held that the proper test to apply in that case was "whether there *clearly appears* in the relevant materials some *overriding* statutory purpose *requiring* the proscription of the specified conduct when engaged in by a white and a Negro, but not otherwise." *Id.* at 192 [emphasis added]. To the further argument that the Florida statute should be upheld because ancillary to and serving the same purpose as an anti-miscegenation statute presumed valid for the purpose of the case, the Court replied:

> There is involved here an exercise of the state police power which trenches upon the constitutionally protected freedom from invidious official discrimination based on race. Such a law, even though enacted pursuant to a valid state interest, bears a heavy burden of justification, as we have said, and will be upheld only if it is

> *necessary,* and not merely rationally related, to the accomplishment of a permissible state policy. *Id.* at 196 [emphasis added].

There were no dissents in the *McLaughlin* case. The two concurring opinions serve to underline and buttress the test applied by the majority. Justice Harlan, joining the Court's opinion, added:

> I agree with the Court * * * that necessity, not mere reasonable relationship, is the proper test, see *ante,* pp. 195–196. *NAACP* v. *Alabama,* 377 U.S. 288, 307–308; *Saia* v. *New York,* 334 U.S. 558, 562; *Martin* v. *Struthers,* 319 U.S. 141, 147; *Thornhill* v. *Alabama,* 310 U.S. 88, 96; *Schneider* v. *State,* 308 U.S. 147, 161, 162; 164; see *McGowan* v. *Maryland,* 366 U.S. 420, 466–467 (Frankfurter, J., concurring).
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> The fact that these cases arose under the principles of the First Amendment does not make them inapplicable here. Principles of free speech are carried to the States only through the Fourteenth Amendment. The necessity test which developed to protect free speech against state infringement should be equally applicable in a case involving state racial discrimination—prohibition of which lies at the very heart of the Fourteenth Amendment.

Id. at 197. Justice Stewart, speaking for himself and Justice Douglas, expressed the view that the majority's test did not go far enough as applied to a *criminal* statute because no overriding state purpose *could* exist.

> * * * I cannot conceive of a valid legislative purpose under our Constitution for a state law which makes the color of a person's skin the test of whether his conduct is a criminal offense. * * * I think it is simply not possible for a state law to be valid under our Constitution which makes the criminality of an act depend upon the race of the actor.

Id. at 198.

Three years later the Court dealt with a Virginia statute prohibiting interracial marriages. The statute was determined to be unconstitutional under the *McLaughlin* test, expressed here in these terms:

> At the very least, the Equal Protection Clause demands that racial classifications, especially suspect in criminal statutes, be subjected to the "most rigid scrutiny," *Korematsu* v. *United States,* 323 U.S. 214, 216 (1944), and, if they are *ever* to be upheld, they must be shown to be *necessary* to the accomplishment of some permissible state objective, independent of the racial discrimination which it was the object of the Fourteenth Amendment to eliminate. * * *
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> There is patently no legitimate *overriding* purpose independent of invidious racial discrimination which justifies this classification.

Loving v. *Virginia,* 388 U.S. 1, 11 (1967) [emphasis added]. Justice Stewart filed a separate concurring opinion—reiterating his belief that there could never be a sufficiently compelling state purpose to justify a criminal statute based on racial classification. *Id.* at 13.

Although *McLaughlin* and *Loving* dealt with criminal statutes and express racial classifications, numerous lower court decisions apply the strict "compelling" or "overriding" purpose standard in the civil area as well as the criminal, and extend its application to facially neutral state action which, in reality, is racially discriminatory in its effect. The definitive case is *Jackson* v. *Godwin,* 400 F. 2d 529 (5th Cir. 1968), in which Judge Tuttle meticulously and exhaustively examines the lower court cases, including those "which have struck down rules and regulations which on their face appear to be non-discriminatory but which *in practice and effect,* if not purposeful design, impose a

heavy burden on Negroes and not on whites, and operate in a racially discriminatory manner." *Id.* at 538-39 [emphasis added]. He concludes his analysis with this formulation of the constitutional standard:

> In both the areas of racial classification and discrimination and First Amendment freedoms, we have pointed out that stringent standards are to be applied to governmental restrictions in these areas, and rigid scrutiny must be brought to bear on the justifications for encroachments on such rights. The State must strongly show some substantial and controlling interest which requires the subordination or limitation of these important constitutional rights, and which justifies their infringement, [citations]; and in the absence of such compelling justification the state restrictions are impermissible infringements of these fundamental and preferred rights. *Id.* at 541.

The most recent application of the "compelling and overriding state interest" test is to be found in the Fifth Circuit's decision in *Hawkins* v. *Town of Shaw*, F. 2d (5th Cir. 1971). The plaintiffs, Negro residents of Shaw, Mississippi, alleged racial discrimination by town officials in the provision of various municipal services. The District Court dismissed the complaint, applying a test akin to that used by the majority in this case: "If actions of public officials are shown to have rested upon rational considerations, irrespective of race or poverty, they are not within the condemnation of the Fourteenth Amendment, and may not be properly condemned upon judicial review." *Hawkins* v. *Town of Shaw*, 303 F. Supp. 1162, 1168 (N.D. Miss. 1969). The Fifth Circuit reversed, pointing to the standard set forth in *Jackson* v. *Godwin*, *supra*, and stating, "In applying this test, defendants' actions may be justified only if they show a compel-

ling state interest." *Hawkins* v. *Town of Shaw*, F. 2d (5th Cir. 1971) (slip opinion at 3).

In *Hawkins* the Fifth Circuit specifically considered the relevance of the defendant's "intent," or "purpose" as the majority in our case would label it. Conceding that "the record contains no direct evidence aimed at establishing bad faith, ill will or an evil motive on the part of the Town of Shaw and its public officials," *Id.* at (slip opinion at 12), the court held: "Having determined that no compelling state interests can possibly justify the discriminatory *results* of Shaw's administration of municipal services, we conclude that a violation of equal protection has occurred." *Id.* at (slip opinion at 13) [emphasis in original text].

Just as Shaw's administration of municipal services violates the constitutional guarantee of equal protection, so too does the creation of the new Scotland Neck School District.[8] The challenged legislation carves an enclave, 57% white and 43% black, from a previously 22% white and 77% black school system.[9] No compelling or overriding state interest justifies the new district, and its formation has a racially discriminatory effect by allowing the white residents of Scotland Neck to shift their children from a school district where they are part of a 22% minority to one where they constitute a 57% majority.

The prevailing opinion draws comfort from the fact that the new school district, because all children in the same grade will attend the same school, will be "integrated throughout." I dare say a 100% white

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[8] Since even the majority concedes that the Littleton-Lake Gaston School District must be enjoined as a racially discriminatory scheme in violation of the Fourteenth Amendment, I do not discus the facts of that case.

[9] One percent of the pupils in Halifax County are Indians.

school district would also be "integrated throughout." The relevant question is what *change* in degree of integration has been effected by the creation of the new district. Here the change is an increase in the percentage of white pupils from 22% to 57%. The Constitution will no more tolerate measures establishing a ratio of whites to blacks which the whites find *more* acceptable than it will measures totally segregating whites from blacks. The 35% shift here is no less discriminatory because it is a shift from 22% to 57% than if it were one from 65% to 100%.[19]

The majority opinion makes the puzzling concession that:

> If the effect of this act was the continuance of a dual school system in Halifax County or the establishment of a dual system in Scotland Neck it would not withstand challenge under the equal protection clause, but we have concluded that it does not have that effect.

The situation here is that the Act sets up in Halifax County two school systems, one with a 50:43 white to black ratio and the other with a 19:80 white to black ratio, in place of one school system with a 22:77 white to black ratio. Thus, the Act constructs a dual school system in Halifax County by the simple expedient of labeling the two sets of schools as separate districts. The majority does not explain

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[19] Judge Winter properly emphasizes in his separate opinion that the effect of the new school districts must be measured by comparing "the racial balance in the preexisting unit with that in the new unit sought to be created, and that remaining in the preexisting unit after the new unit's creation." Focusing, as do I, on the 35% increase in the white student population of the new Scotland Neck School District, he quite correctly notes that "[a] more flagrant example of the creation of a white haven, or a more nearly white haven, would be difficult to imagine."

why the Act can *create* a dual school system in Halifax County if it could not *continue* a dual system there. Nor do they explain why the Act can *establish* a dual school system in Halifax County if it could not *establish* one in Scotland Neck. Obviously no explanation is possible and the legislation severing the Scotland Neck School District fails to meet the test of the equal protection clause.

II

Even if I accepted the majority's formulation as the proper doctrine to control these cases, which I certainly do not, I think their test is misapplied in *Scotland Neck*. The court accepts at face value the defendants' assertions that local control and increased taxation were the dominant objectives to be fulfilled by the new district, with the ultimate goal of providing quality education to the students of Scotland Neck. The facts plainly are to the contrary and demonstrate that, in projecting the new district, race was the primary consideration. The District Court specifically found that a significant factor in the creation of the new school district was

> a desire on the part of the leaders of Scotland Neck to preserve a ratio of black to white students in the schools of Scotland Neck that would be acceptable to white parents and thereby prevent the flight of white students to the increasingly popular all-white private schools in the area.

United States v. *Halifax County Board of Education*, 314 F. Supp. 65, 72 (E.D.N.C. 1970). The defendants do not contest this finding.[11]

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[11] The defendants assert instead that the prevention of white flight is a legitimate goal. However, the Supreme Court in

What starkly exposes the true purpose impelling the redistricting adventure and belies the professions of lofty objectives is the transfer plan initially adopted by the Scotland Neck City Board of Education.[12] Under that plan, parents residing within Halifax County but outside the newly fashioned district could place their children in the Scotland Neck Schools by paying a fee ranging from $100 to $125. The use of transfer plans of this nature as devices to thwart the mandate of *Brown* v. *Board of Education, supra,* has not been uncommon,[13] and the majority here has no difficulty in recognizing that the Scotland Neck transfer plan was a contrivance to perpetuate segregation. Initial applications for transfer under the plan were received from 350 white and only 10 black children in Halifax County. The net result would have been a racial mix of 74% white, 26% black in the Scotland Neck School District, contrasting with 82% black, 17% white, 1% Indian, in the rest of Halifax County.

Monroe v. *Board of Commissioners*, 391 U.S. 450, 459 (1968), has directly addressed itself to this argument, and rejected it out of hand: "We are frankly told in the Brief that without the transfer option it is apprehended that white students will flee the school system altogether. But it should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them." *Brown II*, at 300.

See also Brunson v. *Board of Trustees of School District No. 1 of Clarendon County*, 429 F. 2d 820 (4th Cir. 1970); *Anthony* v. *Marshal County Board of Education*, 409 F. 2d 1287 (5th Cir. 1969). The defendants' candid admission serves only to emphasize the dominant racial considerations behind the whole scheme.

[12] Although the School Board later abandoned the transfer plan, its initial adoption nevertheless reflects the Board's intentions.

[13] *See Monroe* v. *Board of Commissioners*, 391 U.S. 450 (1968); *Gross* v. *Board of Education*, 373 U.S. 683 (1963).

Thus the transfer plan would have operated directly contrary to the obligation to desegregate the schools of Halifax County and distinctly evidences the design of the Scotland Neck School Board to bring into existence a white haven.

Curiously enough, despite its condemnation of the transfer plan, the court declares the plan not relevant in assessing the intent of the North Carolina legislature in enacting Chapter 31, since there is no evidence in the record to show that the legislative body knew a transfer plan would be effected. This reasoning is fallacious for legislators are not so naive and, in any event, are chargeable with the same motivations as the local communities concerned. The relevant inquiry under the majority's test is into the purposes for which state action was taken and, as Judge Winter observes in his separate opinion, when dealing with statutes designed to affect local communities, one must look to the localities to determine the purposes prompting the legislation.[14]

The size of the new school district in Scotland Neck is also a crucial factor to be taken into account in judging the genuineness of the alleged goal of quality education. The Report of the Governor's Study Commission on the Public School System of North Carolina favors the *consolidation* of school districts to increase efficiency in the operations of the public schools,

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[14] Moreover, as the District Court noted, local newspapers, including the *Raleigh News and Observer*, suggested that racial considerations, and not a concern for better educational, motivated the legislation. For example, on February 14, 1969, a month before Chapter 31 was enacted, the *Raleigh News and Observer* commented editorially that the bill provided for an "educational island" dominated by whites and on February 22, 1969, suggested that if the bill passed, it would encourage other school districts to resort to similar legislation.

and suggests 9,000–10,000 as a desirable pupil population, with 3,500 to 4,000 as a minimum. Scotland Neck's minuscule new school district for 695 pupils—one fifth of the suggested minimum—is an anomaly that runs directly counter to the recommendation of the Study Commission that schools be merged into larger administrative units. Moreover, if quality education were the true objective and Scotland Neck residents were deeply concerned with increasing revenue to improve their schools, one might have expected that in-depth consideration would have been given to the financial and educational implications of the new district. However, the District Court found that:

> [t]here were no studies made prior to the introduction of the bill with respect to the educational advantages of the new district, and there was no actual planning as to how the supplement would be spent although some people assumed it would be spent on teachers' supplements.

United States v. *Halifax County Board of Education*, 314 F. Supp. at 74.

Also highly relevant in assessing the dominant purpose is the timing of the legislation splintering the Halifax County school system. During the 1967–68 school year the Halifax County School District maintained racially identifiable schools, and only 46 of the 875 students attending the Scotland Neck school were black. The next school year, under prodding by the Department of Justice, the Halifax County Board of Education assigned to the Scotland Neck school the entire seventh and eighth grades from an adjacent all-black county school, and promised to desegregate completely by 1969–70. A survey by the North Carolina State Department of Education in December 1968 recommended an integration plan which provided that

690 black and 325 white students should attend the Scotland Neck school. It was only then that the bill which later became Chapter 31 was introduced in the General Assembly of North Carolina in 1969. The fact that the Scotland Neck School District was not formed until the prospects for a unitary school system in Halifax County became imminent leads unmistakably to the conclusion that race was the dominant consideration and that the goal was to achieve a degree of racial apartheid more congenial to the white community.[15]

III

The court's incongruous holdings in these two cases, reversing the District Court in *Scotland Neck*, while affirming in the twin case, *Littleton-Lake Gaston*, cannot be reconciled. The uncontested statistics presented in *Scotland Neck* speak even louder in terms of race than the comparable figures for *Littleton-Lake Gaston*. The white community in Scotland Neck has sliced out a predominantly white school system from an overwhelmingly black school district. By contrast, the white community in Littleton-Lake Gaston was more restrained, gerrymandering a 46% white, 54% black, school unit from a county school system that was 27% white, 67% black.[16] The majority attempts to escape the inevitable implications of these statistics by attributing to the North Carolina legislature, which severed the Scotland Neck School District on March 3, 1969, benevolent motivation and obliviousness to the

[15] It is also noteworthy that while the Scotland Neck community claims that it had not been accorded a fair allocation of county school funds over a period of years, this apparently became intolerable only when the Department of Justice exerted pressure for immediate action to effectuate integration.

[16] Six percent of the pupils in Warren County are Indian.

racial objectives of the local white community. Yet the majority unhesitatingly finds a discriminatory purpose in the similar excision of the new Littleton-Lake Gaston School District by the same legislators only one month later, on April 11, 1969. The earlier statute no less than the later provided a refuge for white students and maximized preservation of segregated schools. The record and the District Court's opinion in *Scotland Neck,* no less than the record and the opinion in *Littleton-Lake Gaston,* are replete with evidence of discriminatory motivations. On their facts the two cases are as alike as two peas in a pod.

Judge Bryan soundly recognizes the discordance in the two holdings of the majority. The resolution he proposes is to reverse in both cases. This would indeed cure the inconformity, but at the cost of compounding the error. The correction called for lies in the opposite direction—affirmance in both cases.

IV

If, as the majority directs, federal courts in this circuit are to speculate about the interplay and the relative influence of divers motives in the molding of separate school districts out of an existing district, they will be trapped in a quagmire of litigation. The doctrine formulated by the court is ill-conceived, and surely will impede and frustrate prospects for successful desegregation. Whites in counties heavily populated by blacks will be encouraged to set up, under one guise or another, independent school districts in areas that are or can be made predominantly white.

It is simply no answer to a charge of racial discrimination to say that it is designed to achieve "quality education." Where the effect of a new school district is to create a sanctuary for white students, for which

no compelling and overriding justification can be offered, the courts should perform their constitutional duty and enjoin the plan, notwithstanding professed benign objectives.

Racial peace and the good order and stability of our society may depend more than some realize on a convincing demonstration by our courts that true equality and nothing less is precisely what we mean by our proclaimed ideal of "the equal protection of the laws." The palpable evasions portrayed in this series of cases should be firmly condemned and enjoined. Such examples of racial inequities do not go unheeded by the adversely affected group. They are noted and resented. The humiliations inflicted by such cynical maneuvers feed the fires of hostility and aggravate the problem of maintaining peaceful race relations in the land. In this connection it is timely to bear in mind the admonition of the elder Mr. Justice Harlan, dissenting in *Plessy* v. *Ferguson,* 163 U.S. 537, 560 (1896):

> The destinies of the two races, in this country, are indissolubly linked together, and the interests of both require that the common government of all shall not permit the seeds of race hate to be planted under the sanction of law.

I dissent from the reversal in Nos. 14929 and 14930, *United States* v. *Scotland Neck City Board of Education,* — F. 2d — (4th Cir. 1971), and concur in the affirmance in No. 14990, *Turner* v. *Littleton-Lake Gaston School District,* — F. 2d — (4th Cir. 1971).

ALBERT V. BRYAN, *Circuit Judge,* dissenting: For me there is here no warrant for a decision different from the *Scotland Neck* and *Emporia* deter-

minations. This conclusion derives from the majority's exposition of the fact parallel of these cases with the circumstances of *Littleton-Lake Gaston*. The identicalness irresistibly argues a like disposition—reversal of the judgment on appeal.

WINTER, *Circuit Judge*, dissenting and concurring specially: I dissent from the majority's opinion and conclusion in No. 14,552, *Wright* v. *Council of City of Emporia*, — F. 2d — (4 Cir. 1971), and in Nos. 14929 and 14930, *United States* v. *Scotland Neck City Board of Education*, — F. 2d — (4 Cir. 1971). I concur in the judgment in No. 14990, *Turner* v. *Littleton-Lake Gaston School District*, — F. 2d — (4 Cir. 1971), and I can accept much of what is said in the majority's opinion. There is, however, a broader basis of decision than that employed by the majority on which I would prefer to rest.

Because the majority makes the decision in *Emporia* the basis of decision in *Scotland Neck* and distinguishes them from *Littleton-Lake Gaston*, I will discuss the cases in that order. I would conclude that the cases are indistinguishable, as does my Brother Bryan, although I would also conclude that each was decided correctly by the district court and that in each we should enjoin the carving out of a new school district because it is simply another device to blunt and to escape the ultimate reach of *Brown* v. *Board of Education*, 347 U.S. 483 (1954), and subsequent cases.

I

While the legal problem presented by these cases is a novel one in this circuit, I think the applicable legal standard is found in the opinion of the Supreme Court in Green v. County School Board of New Kent

County, 391 U.S. 430 (1968). In rejecting a "freedom of choice" plan under the circumstances presented there, the Court articulated the duties of both a school board and a district court in implementing the mandate of *Brown*:

> The burden on a school board today is to come forward with a plan that promises realistically to work, *and promises realistically to work now.*
>
> * * * * *
>
> Where the court finds the board to be acting in good faith and the proposed plan to have real prospects for dismantling the state-imposed dual system *"at the earliest possible date,"* then the plan may be said to provide effective relief. Of course, the availability to the board of other more promising courses of action may indicate a lack of good faith; *and at the least it places a heavy burden upon the board to explain its preference for an apparently less effective method.* [emphasis added.]

391 U.S. at 439.

In each of the instant cases, following a protracted period of litigation, a plan designed finally to institute a unitary school system was jeopardized by the attempt of a portion of the existing school district to break away and establish its own schools. I think the advocates of such a subdivision bear the "heavy burden" of persuasion referred to in *Green* because, as in that case, the dominant feature of these cases is the last-minute proposal of an alternative to an existing and workable integration plan. Factually, these cases are not significantly dissimilar from *Green*. Each act of secession would necessarily require the submission and approval of new integration plans for the newly-created districts, and thus each is tantamount to the proposal of a new plan. And while the act giving rise to the alternative approach here is

state legislation rather than a proposal of the local school board, the fact remains that the moving force in the passage of each piece of legislation[1] was of local origin. Few who have had legislative experience would deny that local legislation is enacted as a result of local desire and pressure. It is, therefore, to local activities that one must look to determine legislative intent.

Application of the "heavy burden" standard of *Green* to the instant cases is also supported by considerations of policy. In an area in which historically there was a dual system of schools and at best grudging compliance with *Brown,* we cannot be too careful to search out and to quash devices, artifices and techniques furthered to avoid and to postpone full compliance with *Brown.* We must be assiduous in detecting racial bias masking under the guise of quality education or any other benevolent purpose. Especially must we be alert to ferret out the establishment of a white haven, or a relatively white haven, in an area in which the transition from racially identifiable schools to a unitary system has proceeded slowly and largely unwillingly, where its purpose is at least in part to be a white haven. Once a unitary system has been established and accepted, greater latitude in redefinition of school districts may then be permitted.

Given the application of the *Green* rationale, the remaining task in each of these cases is to discern whether the proposed subdivision will have negative effects on the integration process in each area, and, if so, whether its advocates have borne the "heavy burden" of persuasion imposed by *Green.*

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[1] In *Emporia,* the implementing legislation for the separation already existed; however, the local people alone made the choice to exercise the option which the statute provided.

II

EMPORIA SCHOOL DISTRICT

The City of Emporia, located within the borders of Greensville County, Virginia, became a city of the second class on July 31, 1967, pursuant to a statutory procedure dating back to the 19th Century. While it had the state-created right at that time to establish its own school district, it chose instead to remain within the Greensville County system until June, 1969. It is significant that earlier in this same month, more than a year after it had invalidated a "freedom of choice" plan for the Greensville County system, the district court ordered into effect a "pairing" plan for the county as a further step toward full compliance with *Brown* and its progeny.

The record amply supports the conclusion that the creation of a new school district for the City of Emporia would, in terms of implementing the principles of *Brown*, be "less effective" than the existing "pairing" plan for the county system. In the first place, the delay involved in establishing new plans for the two new districts cannot be minimized in light of the Supreme Court's statement in *Green* that appropriate and effective steps must be taken at once. See also *Carter* v. *West Feliciana School Board*, 396 U.S. 290 (1970); *Alexander* v. *Holmes County Bd. of Ed.*, 396 U.S. 19 (1969). Secondly, as the district court found, the separation of Emporia from Greensville County would have a substantial impact on the racial balance both within the county and within the city. Within the entire county, there are 3,759 students in a racial ratio of 34.1% white and 65.9% black. Within the city there are 1,123 students, 48.3% of whom are white and 51.7% are black. If the city is permitted to establish

its own school system, the racial ratio in the remainder of the county will change to 27.8% white and 72.2% black.[2] To me the crucial element in this shift is not that the 48.3%–51.7% white to black ratio in the town does not constitute the town a white island in an otherwise heavily black county and that a shift of 6% in the percentage of black students remaining in the county is not unacceptably large. Whenever a school area in which racial separation has been a historical fact is subdivided, one must compare the racial balance in the preexisting unit with that in the new unit sought to be created, and that remaining in the preexisting unit after the new unit's creation. A substantial shift in any comparable balances should be cause for deep concern. In this case the white racial percentage in the new unit will increase from 27.8% to 48.3%. To allow the creation of a substantially whiter haven in the midst of a small and heavily black area is a step backward in the integration process.

And finally, the subdivision of the Greensville County school district is "less effective" in terms of the principles of *Brown* because of the adverse psychological effects on the black students in the county which will be occasioned by the secession of a large portion of the more affluent white population from the county schools. If the establishment of an Emporia school district is not enjoined, the black students in

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[2] As part of the establishment of the new system, the Emporia school board proposed a transfer plan whereby Emporia will accept county students upon payment of tuition. The record does not contain any projection of the number of county students who would avail themselves of the plan although in argument counsel was candid in stating that only white parents would be financially able to exercise the option. The transfer plan was quickly abandoned when it became apparent that it might not earn the approval of the district court.

the county will watch as nearly one-half the total number of white students in the county abandon the county schools for a substantially whiter system. It should not be forgotten that psychological factors, and their resultant effects on educational achievement, were a major consideration in the Supreme Court's opinion in *Brown*.

In my mind, the arguments advanced by the residents of Emporia in support of their secession from the county school system do not sustain the "heavy burden" imposed by *Green*. The essence of their position is that, by establishing their own schools over which they will exercise the controlling influence, they will be able to improve the quality of their children's education. They point to a town commitment to such a goal and, in particular, to a plan to increase educational revenues through increased local taxation. They also indicate that they presently have very little voice in the management of the county school system. Although, as the district court found, the existence of these motives is not to be doubted, I find them insufficient in considering the totality of the circumstances.

While the district court found that educational considerations were *a* motive for the decision to separate, it also found that "race was a factor in the city's decision to secede." Considering the timing of the decision in relation to the ordering into effect of the "pairing" plan, as well as the initial proposal of a transfer plan, this finding is unassailable. *Green* indicates that the absence of good faith is an important consideration in determining whether to accept a less effective alternative to an existing plan of integration. The lack of good faith is obvious here.

When the educational values which the residents of Emporia hope to achieve are studied, it appears that the secession will have many deleterious consequences.

As found by the district court, the high school in the city will be of less than optimum size. County pupils will be cut off from exposure to a more urban society. The remaining county system will be deprived of leadership ability formerly derived from the city. It will suffer from loss of the city's financial support, and it may lose teachers who reside in the city. To me, these consequences, coupled with the existence of the racial motive, more than offset the arguments advanced by the residents of Emporia. The separation, with its negative effects on the implementation of the principles of *Brown*, should be enjoined.

III

SCOTLAND NECK SCHOOL DISTRICT

As the majority's opinion recites, the history of resistance to school desegregation in the Halifax County school system parallels the history of the attempts on the part of the residents of Scotland Neck to obtain a separate school district. The significant fact is that in spite of otherwise apparently cogent arguments to justify a separate system, the separate system goal was not realized until, as the result of pressure from the United States Department of Justice, the Halifax County Board agreed to transfer the seventh and eighth grade black students from the previously all-black Brawley School, outside the city limits of Scotland Neck, to the Scotland Neck School, previously all-white. Chapter 31 followed thereafter as soon as the North Carolina legislature met. It is significant also that the Halifax County Board reneged on its agreement with the Department of Justice shortly before the enactment of Chapter 31.

The same negative effects on achieving integration which are present in the Emporia secession are present

here. Although the City of Scotland Neck has already submitted a plan for its school district, delay will result in devising such a plan for the remaining portion of Halifax County. The racial balance figures show that the existing county system has 8,196 (77%) black students, 2,357 (22%) white students, and 102 (1%) Indian students. Within the city system, there would be 399 (57.4%) white and 296 (42.6%) black, while the remaining county system would be comprised of 7,900 (80%) black, 1,958 (19%) white and 102 (1%) Indian. The difference between the percentage of white students within the existing system and the newly-created one for Scotland Neck is thus 35%. A more flagrant example of the creation of a white haven, or a more nearly white haven, would be difficult to imagine. The psychological effects on the black students cannot be overestimated.

The arguments advanced on behalf of Scotland Neck are likewise insufficient to sustain the burden imposed by *Green*. Even if it is conceded that one purpose for the separation was the local desire to improve the educational quality of the Scotland Neck schools, the record supports the conclusion of the district court that race was a major factor. If the basic purpose of Chapter 31 could not be inferred from the correlation of events concerning integration litigation and the attempt to secede, other facts make it transparent. As part of its initial plan to establish a separate system, Scotland Neck proposed to accept transfer students from outside the corporate limits of the city on a tuition basis. Under this transfer system, the racial balance in the Scotland Neck area was 749 (74%) white to 262 (26%) black, and the racial balance in the rest of Halifax County became 7,934 (82%) black, 1,608 (17%) white, and 102

(1%) Indian.[3] This proposal has not yet been finally abandoned. In oral argument before us, counsel would not tell us forthrightly that this would not be done, but rather, equivocally indicated that the proposal would be revived if we, or the district court, could be persuaded to approve it. I cannot so neatly compartmentalize Chapter 31 and the transfer plan as does the majority, and conclude that one has no relevance to the other. To me, what was proposed, and still may be attempted, by those who provided the motivation for the enactment of Chapter 31 is persuasive evidence of what Chapter 31 was intended to accomplish.

In terms of educational values, the separation of Scotland Neck has serious adverse effects. Because Scotland Neck, within its corporate boundaries, lacked sufficient facilities even to operate a system to accommodate the only 695 pupils to be educated, it purchased a junior high school from Halifax County. This school is located outside of the corporate boundaries of Scotland Neck. The sale deprives the students of Halifax County, outside of Scotland Neck, of a school facility. The record contains abundant, persuasive evidence that the best educational policy and the nearly unanimous opinion of professional educa-

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[3] There is apparent error in the computations made by the district court in this regard. The district court found that the net effect of the transfer plan would be to add 350 white students to the city system. Added to the resident white students (399), the total is 749, not 759 as indicated in the opinion of the district court. The district court's figure of 262 black students in the city under the transfer plan (a net loss of 34) appears correct. But when these two totals are subtracted from the figures given for the existing county system in 1968–1969 (2,357 white, 8,196 black and 102 Indian), the effects on the county are as shown above.

tors runs contrary to the creation of a small, separate school district for Scotland Neck. A study by the State of North Carolina indicates that a minimally acceptable district has 3,500–4,000 pupils.

On the facts I cannot find the citizens of Scotland Neck motivated by the benign purpose of providing additional funds for their schools; patently they seek to blunt the mandate of *Brown*. Even if additional financial support for schools was a substantial motive, the short answer is that a community should not be permitted to buy its way out of *Brown*. Here again, the "heavy burden" imposed by *Green* has not been sustained.

IV

LITTLETON-LAKE GASTON SCHOOL DISTRICT

The majority's opinion correctly and adequately discloses the legislative response to court-ordered compliance with *Brown* and its progeny. That response was the creation of the Warrenton City School District and the Littleon-Lake Gaston School District. The overall effect of the creation of the Littleton-Lake Gaston district, the proposed tuition transfer plan, and the creation of the Warrenton City district (an act enjoined by the district court and not before us) would be to permit more than 4 out of 5 white students to escape the heavily black schools of Warren County. Even without the transfer plan, the racial balance in the Littleton-Lake Gaston district would show nearly 20% more white students than in the existing Warren County unit. To permit the subdivision would be to condone a devastating blow to the progress of school integration in this area.

Despite the assertion of the benign motives of remedying long-standing financial inequities and the

preservation of local schools, I agree with the majority that the "primary" purpose and effect of the legislation creating the Littleton-Lake Gaston school district was to carve out a refuge for white students and to preserve to the fullest possible extent segregated schools. Aside from questions of motivation, the record shows that the new district was established to accommodate a total of only 659 students, despite state policy to the contrary and expert opinion that its small size rendered it educationally not feasible. And, as the majority indicates, there is no evidence that the residents of the Littleton area have been deprived of their proportionate voice in the operation of the schools of Warren County. In short, there is a complete absence of persuasive argument in favor of the creation of the new district.

While I agree that the injunction should stand, I disagree that injunctive relief should be granted only when racial motivation was the "primary" motive for the creation of the new district. Consistent with *Green,* we should adopt the test urged by the government in *Scotland Neck,* i.e., to view the results of the severance as if it were a part of a desegregation plan for the original system—that is, to determine whether the establishment of a new district would, in some way, have an adverse impact on the desegregation of the overall system. By this test the injunction would stand in the *Littleton-Lake Gaston* case, as well as in each of the two other cases, because in each of the three there is at least some racial motivation for the separation, and some not insubstantial alteration of racial ratios, some inherent delay in achieving an immediate unitary system in all of the component parts, and an absence of compelling justification for what is sought to be accomplished.

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BUTZNER, *Circuit Judge:* This appeal involves the same case in which I decided questions concerning the school board's compliance with the Fourteenth Amendment when I served on the district court.* While the details differ, the same basic issues remain—the validity of measures taken to disestablish a dual school system, to create a unitary system, and to assign pupils and faculty to achieve these ends.

> Title 28 U.S.C. § 47 provides: "No judge shall hear or determine an appeal from the decision of a case or issue tried by him."

Recently, Judge Craven carefully examined this statute and the cases and authorities which cast light on it. He concluded that he should not sit on an appeal of a case in which he had participated as a district judge when the ultimate questions were the same: "what may a school board be compelled to do to dismantle a dual system and implement a unitary one, or how much school board action is enough?" See Swann v. Charlotte-Mecklenburg Bd. of Ed., 431 F. 2d 135, (4th Cir. 1970). Following the sound precedent established by Judge Craven, I believe that I must disqualify myself from participating in this appeal.

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* See *Wright* v. *County School Bd. of Greensville County, Va.*, 252 F. Supp. 378 (E.D. Va. 1966). Two other opinions were not published.

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 14929

UNITED STATES OF AMERICA, AND PATTIE BLACK COTTON, EDWARD M. FRANCIS, PUBLIC SCHOOL TEACHERS OF HALIFAX COUNTY, ET AL., APPELLEES

versus

SCOTLAND NECK CITY BOARD OF EDUCATION, A BODY CORPORATE, APPELLANT

No. 14930

UNITED STATES OF AMERICA, AND PATTIE BLACK COTTON, EDWARD M. FRANCIS, PUBLIC SCHOOL TEACHERS OF HALIFAX COUNTY, AND OTHERS, APPELLEES

versus

ROBERT MORGAN, ATTORNEY GENERAL OF NORTH CAROLINA, THE STATE BOARD OF EDUCATION OF NORTH NORTH CAROLINA, AND DR. A. CRAIG PHILLIPS, NORTH CAROLINA STATE SUPERINTENDENT OF PUBLIC INSTRUCTION, APPELLANTS

Appeal from the United States District Court for the Eastern District of North Carolina, at Wilson

ALGERNON L. BUTLER, District Judge, and JOHN D. LARKINS, JR., District Judge

422-400—71— 2

Argued September 16, 1970

Before BOREMAN, BRYAN and CRAVEN, Circuit Judges

Reargued December 7, 1970—Decided March 23, 1971

Before HAYNSWORTH, Chief Judge, SOBELOFF, BOREMAN, BRYAN, WINTER, CRAVEN and BUTZNER, Circuit Judges sitting en banc, on resubmission

William T. Joyner and *C. Kitchin Josey* (*Joyner & Howison* and *Robert Morgan*, Attorney General of North Carolina, on brief) for Appellants; and *Brian K. Landsberg*, Attorney, Department of Justice (*Jerris Leonard*, Assistant Attorney General, *David L. Norman*, Deputy Assistant Attorney General, and *Francis H. Kennedy, Jr.*, Attorney, Department of Justice, and *Warren H. Coolidge*, United States Attorney, on brief) for Appellee United States of America; and *James R. Walker, Jr.*, (*Samuel S. Mitchell* on brief) for Appellees Pattie Black Cotton, et al.

CRAVEN, Circuit Judge:

The Scotland Neck City Board of Education and the State of North Carolina have appealed from an order of the United States District Court for the Eastern District of North Carolina entered May 23, 1970, declaring Chapter 31 of the 1969 Session Laws of North Carolina unconstitutional and permanently enjoining any further implementation of the statute.[1] We reverse.

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[1] This is one of three cases now before the Court involving the "carving out" of part of a larger school district. The others are Alvin Turner v. Littleton-Lake Gaston School District, — F. 2d — (No. 14,990) and Wright v. Council of City of Emporia, — F. 2d — (No. 14,552).

Chapter 31 of the 1969 Session Laws of North Carolina,[2] enacted by the North Carolina General Assembly on March 3, 1969, provided for a new school district bounded by the city limits of Scotland Neck upon the

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[2] Chapter 31 is entitled and reads as follows:

"AN ACT to improve and provide public schools of a higher standard for the residents of Scotland Neck in Halifax County, to establish the Scotland Neck City Administrative Unit, to provide for the administration of the public schools in said administrative unit, to levy a special tax for the public schools of said administrative unit, all of which shall be subject to the approval of the voters in a referendum or special election

SECTION 1. There is hereby classified and established a public school administrative unit to be known and designated as the Scotland Neck City Administrative Unit which shall consist of the territory or area lying and being within the boundaries or corporate limits of the Town of Scotland Neck in Halifax County, and the boundaries of said Scotland Neck City Administrative Unit shall be coterminous with the present corporate limits or boundaries of the Town of Scotland Neck. The governing board of said Scotland Neck City Administrative Unit shall be known and designated as the Scotland Neck City Board of Education, and said Scotland Neck City Board of Education (hereinafter referred to as: Board) shall have and exercise all of the powers, duties, privileges and authority granted and applicable to city administrative units and city boards of education as set forth in Chapter 115 of the General Statutes, as amended.

"SECTION 2. The Board shall consist of five members appointed by the governing authority of the Town of Scotland Neck, and said five members shall hold office until the next regular municipal election of the Town of Scotland Neck to be held in May, 1971. At the regular election for Mayor and Commissioners of the Town of Scotland Neck to be held in May, 1971, there shall be elected five members of the Board, and three persons so elected who receive the highest number of votes shall hold office for four years and the two persons elected who receive the next highest number of votes shall hold office

approval of a majority of the voters of Scotland Neck in a referendum. The new school district was approved by the voters of Scotland Neck on April 8, 1969, by a vote of 813 to 332 out of a total of 1,305 registered

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for two years, and thereafter all members of the Board so elected, as successors, shall hold office for four years. All members of the Board shall hold their offices until their successors (sic) are elected and qualified. All members of the Board shall be eligible to hold public office as required by the Constitution and laws of the State.

"SECTION 3. All members of the Board shall be elected by the qualified voters of the Town of Scotland Neck and said election shall be held and conducted by the governing authority of the Town of Scotland Neck and by its election officials and pursuant to the same laws, rules and regulations as are applicable to the election of the municipal officials of the Town of Scotland Neck, and the results shall be certified in the same manner. The election of members of the Board shall be held at the same time and place as applicable to the election of the Mayor and Board of Commissioners of the Town of Scotland Neck and in accordance with the expiration of terms of office of members of the Board. The members of the Board so elected shall be inducted into office on the first Monday following the date of election, and the expense of the election of the members of the Board shall be paid by the Board.

"SECTION 4. At the first meeting of the Board appointed as above set forth and of a new Board elected as herein provided, the Board shall organize by electing one of its members as chairman for a period of one year, or until his successor is elected and qualified. The chairman shall preside at the meetings of the Board, and in the event of his absence or sickness, the Board may appoint one of its members as temporary chairman. The Scotland Neck City Superintendent of Schools shall be ex officio secretary to his Board and shall keep the minutes of the Board but shall have no vote. If there exists a vacancy in the office of Superintendent, then the Board may appoint one of its members to serve temporarily as secretary to the Board. All vacancies in the membership of the Board by death, resignation, removal, change

voters. Prior to this date, Scotland Neck was part of the Halifax County school district. In July 1969, the United States Justice Department filed the complaint in this action against the Halifax County Board

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of residence or otherwise shall be filled by appointment by the governing authority of the Town of Scotland Neck of a person to serve for the unexpired term and until the next regular election for members of the Board when a successor shall be elected.

"SECTION 5. All public school property, both real and personal, and all buildings, facilities, and equipment used for public school purposes, located within the corporate limits of Scotland Neck and within the boundaries set forth in Section 1 of this Act, and all records, books, moneys budgeted for said facilities, accounts, papers, documents and property of any description shall become the property of Scotland Neck City Administrative Unit or the Board; all real estate belonging to the public schools located within the above-described boundaries is hereby granted, made over to, and automatically by force of this Act conveyed to the Board from the County public school authorities. The Board of Education of Halifax County is authorized and directed to execute any and all deeds, bills of sale, assignments or other documents that may be necessary to completely vest title to all such property to the Board.

"SECTION 6. Subject to the approval of the voters residing within the boundaries set forth in Section 1 of this Act, or within the corporate limits of the Town of Scotland Neck, as hereinafter provided, the governing authority of the Town of Scotland Neck, in addition to all other taxes, is authorized and directed to levy annually a supplemental tax not to exceed Fifty Cents (50c) on each One Hundred ($100.00) Dollars of the assessed value of the real and personal property taxable in said Town of Scotland Neck. The amount or rate of said tax shall be determined by the Board and said tax shall be collected by the Tax Collector of the Town of Scotland Neck and paid to the Treasurer of the Board. The Board may use the proceeds of the tax so collected to supplement any object or item in the school budget as fixed by law or to supplement

of Education seeking the disestablishment of a dual school system operated by the Board and seeking a declaration of invalidity and an injunction against the implementation of Chapter 31. Scotland Neck

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any object or item in the Current Expense Fund or Capital Outlay Fund as fixed by law.

"SECTION 7. Within ten days from the date of the ratification of this Act it shall be the duty of the governing authority of the Town of Scotland Neck to call a referendum or special election upon the question of whether or not said Scotland Neck City Administrative Unit and its administrative board shall be established and whether or not the special tax herein provided shall be levied and collected for the purposes herein provided. The notice of the special election shall be published once a week for two successive weeks in some newspaper published in the Town of Scotland Neck. The notice shall contain a brief statement of the purpose of the special election, the area in which it shall be held, and that a vote by a majority of those voting in favor of this Act will establish the Scotland Neck City Administrative Unit and its Administrative Board as herein set forth, and that an annual tax not to exceed Fifty Cents (50c) on the assessed valuation of real and personal property, according to each One Hundred Dollars ($100.00) valuation, the rate to be fixed by the Board, will be levied as a supplemental tax in the Town of Scotland Neck, for the purpose of supplementing any lawful public school budgetary item. A new registration of voters shall not be required and in all respects the laws and regulations under which the municipal elections of the Town of Scotland Neck are held shall apply to said special election. The governing authority of the Town of Scotland Neck shall have the authority to enact reasonable rules and regulations for the necessary election books, records and other documents for such special election and to fix the necessary details of said special election.

"SECTION 8. In said referendum or special election a ballot in form substantially as follows shall be used: VOTE FOR ONE:

"( ) FOR creating and establishing Scotland Neck City Administrative Unit with administrative Board to operate pub-

City Board of Education was added as a defendant in August 1969, and the Attorney General of North Carolina was added as a defendant in November 1969. On August 25, 1969, the District Court issued a temporary injunction restraining the implementation of Chapter 31, and thereafter on May 23, 1970, made the injunction permanent. The District Court reasoned that Chapter 31 was unconstitutional because it would create a refuge for white students and would interfere with the desegregation of the Halifax County school system.

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lic schools of said Unit and for supplemental tax not to exceed Fifty Cents (50c) on the assessed valuation of real and personal property according to each One Hundred Dollars ($100.00) valuation for objects of school budget.

"( ) AGAINST creating and establishing Scotland Neck City Administrative Unit with administrative Board to operate public schools of said Unit and against supplemental tax not to exceed Fifty Cents (50c) on the assessed valuation of real and personal property according to each One Hundred Dollars ($100.00) valuation for objects of school budget.

"If a majority of the qualified voters voting at such referendum or special election vote in favor of establishing Scotland Neck City Administrative Unit, for creation of administrative Board to operate public schools of said Unit and for special supplemental tax as herein set forth, then this Act shall become effective and operative as to all its provisions upon the date said special election results are canvassed and the result judicially determined, otherwise to be null and void. The expense of said referendum or special election shall be paid by the governing authority of the Town of Scotland Neck but if said Unit and Board are established, then said Town of Scotland Neck shall be reimbursed by the Board for said expense as soon as possible.

"SECTION 9. All laws and clauses of laws in conflict with this Act are hereby repealed.

"SECTION 10. This Act shall be in full force and effect according to its provisions from and after its ratification."

It is clear that Chapter 31 is not unconsitutional on its face. But a facially constitutional statute may in the context of a given fact situation be applied unfairly or for a discriminatory purpose in violation of the equal protection clause of the Fourteenth Amendment. *Yick Wo* v. *Hopkins,* 118 U.S. 356 (1886). We cannot judge the validity of the statute in vacuo but must examine it in relation to the problem it was meant to solve. *Poindexter* v. *Louisiana Financial Assistance Commission,* 275 F. Supp. 833 (E.D. La. 1967).

I

THE HISTORY OF SCHOOL DESEGREGATION IN HALIFAX COUNTY AND THE ATTEMPTS TO SECURE A SEPARATE SCHOOL DISTRICT FOR THE CITY OF SCOTLAND NECK

For many years until 1936, the City of Scotland Neck was a wholly separate school district operating independently of the Halifax County school system into which it was then merged. Both the elementary and the high school buildings presently in use in Scotland Neck were constructed prior to 1936 and were financed by city funds.

Halifax County operated a completely segregated dual school system from 1936 to 1965. In 1965, Halifax County adopted a freedom-of-choice plan. Little integration resulted during the next three years. Shortly after the Supreme Court decision in *Green* v. *County School Board of New Kent County,* 391 U.S. 430, in May of 1968, the Halifax County Board of Education requested the North Carolina Department of Public Instruction to survey their schools and to make recommendations regarding desegregation of the school system.

In July 1968, the Justice Department sent a "notice letter" to the Halifax County Board notifying them that they had not disestablished a dual school system and that further steps would be necessary to comply with *Green*. After negotiations with the Justice Department, the Halifax County Board agreed informally to disestablish their dual school system by the beginning of the 1969–70 school year, with a number of interim steps to be taken in the 1968–69 school year. As part of the interim steps, the seventh and eighth grades were transferred from the Brawley School, an all-black school located just outside the city limits of Scotland Neck, to the Scotland Neck School, previously all white.

The results of the North Carolina Department of Public Instruction survey were published in December of 1968. It recommended an interim plan and a long range plan. The interim plan proposed the creation of a unitary school system through a combination of geographic attendance zones and pairing of previously all-white schools with previously all-black schools. Scotland Neck School was to be paired with Brawley School, grades 1–4 and 8–9 to attend Brawley and grades 5–6 and 10–12 to attend Scotland Neck. The long range plan called for the building of two new consolidated high schools, each to serve half of the geographic area composing the Halifax County school district. The Halifax County Board of Education declined to implement the plan proposed by the Department of Public Instruction and the Justice Department filed suit in July 1969.

Paralleling this history of school segregation in the Halifax County school system is a history of attempts on the part of the residents of Scotland Neck to ob-

tain a separate school district. The proponents of a separate school district began to formulate their plans in 1963, five years prior to the *Green* decision and two years prior to the institution of freedom-of-choice by the Halifax County Board. They were unable to present their plan in the form of a bill prior to the expiration of the 1963 session of the North Carolina Legislature, but a bill was introduced in the 1965 session which would have created a separate school district composed of Scotland Neck and the four surrounding townships, funded partially through local supplemental property taxes. The bill did not pass and it was the opinion of many of the Scotland Neck residents that its defeat was the result of opposition of individuals living outside the city limits of Scotland Neck.

At the instigation of the only Halifax County Board of Education member who was a resident of Scotland Neck, a delegation from the Halifax County schools attempted in 1966 to get approval for the construction of a new high school facility in Scotland Neck to be operated on a completely integrated basis. The proposal was not approved by the State Division of School Planning.

After visiting the smallest school district in the state to determine the economic feasibility of creating a separate unit for the City of Scotland Neck alone, the proponents of a separate school district again sponsored a bill in the Legislature. It was this bill which was eventually passed on March 31, 1969, as Chapter 31 of the Session Laws of 1969.

II

THE THREE PURPOSES OF CHAPTER 31

The District Court found that the proponents of a special school district had three purposes in mind in sponsoring Chapter 31 and the record supports these findings. First, they wanted more local control over their schools. Second, they wanted to increase the expenditures for their schools through local supplementary property taxes. Third, they wanted to prevent anticipated white fleeing of the public schools.

Local control and increased taxation were thought necessary to increase the quality of education in their schools. Previous efforts to upgrade Scotland Neck Schools had been frustrated. Always it seemed the needs of the County came before Scotland Neck. The only county-wide bond issue passed in Halifax County since 1936 was passed in 1957. Two local school districts operating in Halifax County received a total of $1,020,000 from the bond issue and the Halifax County system received $1,980,000. None of the money received by Halifax County was spent on schools within the city limits of Scotland Neck. If Scotland Neck had been a separate school district at the time, it would have received $190,000 as its proportionate share of the bond issue. The Halifax County system also received $950,000 in 1963 as its proportionate share of the latest statewide bond issue. None of this money was spent or committed to any of the schools within the city limits of Scotland Neck. Halifax County has reduced its annual capital outlay tax from 63 cents per $100 valuation in 1957 to 27.5 cents per $100 valuation in the latest fiscal year. In order for the referendum to pass under the terms of Chapter 31, the voters of Scotland Neck had to approve not

only the creation of a separate school district but in addition had to authorize a local supplementary property tax not to exceed 50 cents per $100 valuation per year. Despite such a political albatross the referendum was favorable, and moreover, the supplementary tax was levied by the Scotland Neck Board at the full 50 cent rate.

III

WHITE FLEEING—THE QUESTIONABLE THIRD PURPOSE

But it is not the permissable first purpose or the clearly commendable second purpose which caused the District Court to question the constitutionality of Chapter 31. It is rather the third purpose, a desire on the part of the proponents of Chapter 31 to prevent, or at least diminish, the flight of white students from the public schools, that concerned the District Court. The population of Halifax County is predominantly black. The population of Scotland Neck is approximately 50 percent black and 50 percent white, and the District Court found that the pupil ratio by race in the schools would have been 57.3 percent white to 42.7 percent black.

A number of decisions have mentioned the problem of white flight following the integration of school systems which have a heavy majority of black students. *Monroe* v. *Board of Commissioners of the City of Jackson*, 391 U.S. 450, 459 (1968); *Brunson* v. *Board of Trustees of School District No. 1 of Clarendon County*, — F. 2d — (4th Cir. 1970); *Walker* v. *County School Board of Brunswick County*, 413 F. 2d 53 (4th Cir. 1969); *Anthony* v. *Marshall County Board of Education*, 409 F. 2d 1287 (5th Cir. 1969). All of these cases hold that the threat of white flight will not justify the continuing operation of a dual

school system. But it has never been held by any court that a school board (or a state) may not constitutionally consider and adopt measures for the purpose of curbing or diminishing white flight from a unitary school system. Indeed it seems obvious that such a purpose is entirely consistent with and may help implement the *Brown* principle. It is not the purpose of preventing white flight which is the subject of judicial concern but rather the price of achievement. If the effect of Chapter 31 is to continue a dual school system in Halifax County, or establish one in Scotland Neck, the laudable desire to stem an impending flow of white students from the public schools will not save it from constitutional infirmity. But if Chapter 31 does not have that effect, the desire of its proponents to halt white flight will not make an otherwise constitutional statute unconstitutional.

In considering the effect of Chapter 31 on school desegregation in Halifax County and Scotland Neck, it is important to distinguish the effect of Chapter 31 from the effect of a transfer plan adopted by the Scotland Neck Board of Education. The effect of the transfer plan was to substantially increase the percentage of white students in the Scotland Neck schools. But the transfer plan is solely the product of the Scotland Neck Board of Education and not Chapter 31. Therefore the effect of the transfer plan has no relevance to the question of the constitutionality of Chapter 31.[3]

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[3] Appellees argue that the creation of the transfer plan is evidence that the intended effect of Chapter 31 was to preserve the previous racial makeup of the Scotland Neck schools. We disagree.

We are concerned here with the intent of the North Carolina Legislature and not the intent of the Scotland Neck Board. In determining legislative intent of an act such as Chapter 31,

The District Court held that the creation of a separate Scotland Neck School district would unconstitutionally interfere with the implementation of a plan to desegregate the Halifax County schools adopted by the Halifax County Board of Education. We hold that the effect of the separation of the Scotland Neck schools and students on the desegregation of the remainder of the Halifax County system is minimal and insufficient to invalidate Chapter 31. During the 1968–69 school year, there were 10,655 students in the Halifax County Schools, 8,196 (77%) were black, 2,357 (22%) were white, and 102 (1%) were Indian. Of this total, 605 children of school age, 399 white and 296 black, lived within the city limits of Scotland Neck. Removing the Scotland Neck students from the Halifax County system would have left 7,900 (80%) black students, 1,958 (19%) white students, and 102 (1%) Indian students. This is a shift in the ratio of black to white students of only 3 percent, hardly a substantial change. Whether the Scotland Neck students remain within the Halifax County system or attend separate schools of their own, the Halifax County schools will have a substantial majority of black students. Nor would there be a per pupil de-

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it is appropriate to consider the reason that the proponents of the act desired its passage if it can be inferred that those reasons were made known to the Legislature. There is evidence in the record to show that the three purposes that the District Court found were intended by the proponents of Chapter 31 were presented to the Legislature. However, there is nothing in the record to suggest that the Legislature had any idea that the Scotland Neck Board would adopt a transfer plan after the enactment of Chapter 31 which would have the effect of increasing the percentage of white students.

We will discuss the transfer plan later in a separate part of the opinion.

crease in the proceeds from the countywide property taxes available in the remaining Halifax County system. The county tax is levied on all property in the county and distributed among the various school districts in the county on a per pupil basis. In addition, the Superintendent of Schools for the Halifax County system testified that there would be no decrease in teacher-pupil ratio in the remaining Halifax County system and in fact that in a few special areas, such as speech therapy, the teacher-pupil ratio may actually increase.

Nor can we agree with the District Court that Chapter 31 creates a refuge for the white students of the Halifax County system. Although there are more white students than black students in Scotland Neck, the white majority is not large, 57.3 percent white and 42.6 percent black. Since all students in the same grade would attend the same school, the system would be integrated throughout. There is no indication that the geographic boundaries were drawn to include white students and exclude black students as there has been in other cases where the courts have ordered integration across school district boundaries. *Haney v. County Board of Education of Sevier County*, 410 F. 2d 920 (8th Cir. 1969). The city limits provide a natural geographic boundary. There is nothing in the record to suggest that the greater percentage of white students in Scotland Neck is a product of residential segregation resulting in part from state action. See *Brewer v. School Board of the City of Norfolk*, 397 F. 2d 37 (4th Cir. 1968).

From the history surrounding the enactment of Chapter 31 and from the effect of Chapter 31 on school desegregation in Halifax County, we conclude that the purpose of Chapter 31 was not to invidiously

discriminate against black students in Halifax County and that Chapter 31 does not violate the equal protection clause of the Fourteenth Amendment.

Appellees urge in their brief that conceptually the way to analyze this case is to "view the results of severance as if it were part of a desegregation plan for the original system." We do not agree. The severance was not part of a desegregation plan proposed by the school board but was instead an action by the Legislature redefining the boundaries of local governmental units. If the effect of this act was the continuance of a dual school system in Halifax County or the establishment of a dual system in Scotland Neck it would not withstand challenge under the equal protection clause, but we have concluded that it does not have that effect.

But assuming for the sake of argument that the appellees' method of analysis is correct, we conclude that the severance of Scotland Neck students would still withstand constitutional challenge. Although it is not entirely clear from their brief, appellants' apparent contention is that the variance in the ratio of black to white students in Scotland Neck from the ratio in the Halifax County system as a whole is so substantial that if Scotland Neck was proposed as a geographic zone in a desegregation plan, the plan would have to be disapproved. The question of "whether, as a constitutional matter, any particular racial balance must be achieved in the schools" has yet to be decided by the courts. *Northcross v. Board of Education of Memphis*, —U.S.—, 90, S. Ct. 891, 893 (1970) (Burger, C. J., concurring). In its first discussion of remedies for school segregation, *Brown v. Board of Education of Topeka*, 349 U.S. 294 (1955) (Brown II), the Supreme Court spoke in terms of "practical flexibility" and "reconciling pub-

lic and private needs." 349 U.S. at 300. In *Green v. County School Board of New Kent County,* 391 U.S. 430 (1968), the court made it clear that the school board has the burden of explaining its preference for a method of desegregation which is less effective in disestablishing a dual school system than another more promising method. Even if we assume that a more even racial balance throughout the schools of Halifax County would be more effective in creating a unitary school system, we conclude that the deviation is adequately explained by the inability of people of Scotland Neck to be able to increase the level of funding of the schools attended by their children when the geographic area served by those schools extended beyond the city limits of Scotland Neck.

Our conclusion that Chapter 31 is not unconstitutional leaves for consideration the transfer plan adopted by the Scotland Neck School Board. The transfer plan adopted by the Board provided for the transfer of students from the remaining Halifax County system into the Scotland Neck system and from the Scotland Neck system into the Halifax County system. Transfers into the Scotland Neck system were to pay $100 for the first child in a family, $25 for the next two children in a family, and no fee for the rest of the children in a family. As a result of this transfer plan, 350 white students and 10 black students applied for transfer into the Scotland Neck system, and 44 black students applied for transfer out of the system. The net result of these transfers would have been to have 74 percent white students and 26 percent black students in the Scotland Neck system. We conclude that these transfers would have tended toward establishment of a resegregated system and that the transfer plan violates the equal protection clause of the Fourteenth Amend-

ment.' See *Monroe v. Board of Commissioners of the City of Jackson*, 391 U.S. 450 (1968).

We reverse the judgment of the District Court holding Chapter 31 unconstitutional, and remand to the District Court with instructions to dissolve its injunction. The District Court will retain jurisdiction to consider plans of integration proposed by Halifax County Board of Education and by Scotland Neck Board of Education.

'Perhaps it should be noted that in the school board's amended answer filed on September 3, 1969, it withdrew the original transfer plan and represented to the District Court that it intended to allow only such transfers as "may be in conformity to the law and/or Court order or orders applicable to Defendant, and in conformity to a plan of limitation of transfers to be prepared by Defendant and submitted to this Court."

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 14990

ALVIN TURNER, ET AL., AND JOANNE AMELIA CLAYTON, ET AL., APPELLEES

versus

THE LITTLETON-LAKE GASTON SCHOOL DISTRICT, A PUBLIC BODY CORPORATE OF WARREN COUNTY AND HALIFAX COUNTY, NORTH CAROLINA, APPELLANT

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh

Algernon L. Butler and *John D. Larkins, Jr.*, District Judges.

Argued December 7, 1970—Decided March 23, 1971

Before HAYNSWORTH, Chief Judge, SOBELOFF, BOREMAN, BRYAN, WINTER, CRAVEN and BUTZNER, Circuit Judges sitting en banc

William S. McLean (*McLean, Stacy, Henry & McLean; James H. Limer; Robert Morgan,* Attorney General of North Carolina, and *Ralph Moody,* Deputy Attorney General of North Carolina, on brief) for Appellant, and *Adam Stein* (*J. LeVonne Chambers,* and *Chambers, Stein, Ferguson & Lanning; T. T. Clayton* and *Frank Ballance,* and *Clayton* and *Ballance; Conrad O. Pearson; Jack Greenberg, James M. Nabrit, III,* and *Norman Chachkin* on brief) for Appellees.

CRAVEN, *Circuit Judge:* This is one of three cases on appeal in which the court below enjoined the carving out of a new school district containing approximately 50 percent white students and 50 percent black students from a county school district containing a substantial majority of black students. In the other two cases, we reversed the district court. *United States* v. *Scotland Neck Board of Education,* — F. 2d —, Nos. 14929 and 14930 (4th Cir. ——, 1971); *Wright* v. *Council of City of Emporia,* — F. 2d —, No. 14552 (4th Cir. ——, 1971). In this one, we affirm.

This suit to compel the desegregation of the Warren County school system was begun in 1963. Back then Warren County had assigned all of the white students to six all-white schools, all of the black students to thirteen all-black schools and all of the Indian students to one all-Indian school. During the school years beginning in the fall of 1964, 1965 and 1966, Warren County assigned its students to the various schools through a freedom of choice plan. On May 16, 1967, the district court determined that the freedom of choice plan had failed to materially alter the previously existing racially segregated school system and ordered the Warren County School Board to take affirmative action to eliminate the dual school system. The affirmative action taken by the school board was to assign a handful of black and Indian students to predominantly white schools and assign four teachers across racial lines. On July 31, 1968, the district court found that Warren County was still operating a dual school system and ordered the school board to file a plan for the elimination of racial segregation. The first two plans were rejected as inadequate. Finally, on December 1, 1968, the school board submitted a third plan providing for geographic attendance zones

to take effect with the beginning of the 1969–70 school year. This plan was approved by the district court in July 1969.

Opposition to the school board's third plan arose soon after it was submitted. The opposition resulted in proposals for the creation of separate school districts for the town of Warrenton and the area surrounding the town of Littleton. Bills were introduced to the North Carolina legislature to carve new school districts for these two areas out of the existing Warren County school district. The governing bodies of the two new school districts were denominated the Warrenton City Board of Education and the Littleton-Lake Gaston School District. The Warren County Board of Education approved petitions urging the passage of these bills. The two bills were passed by the North Carolina legislature and ratified as Chapters 578 and 628 of the 1969 North Carolina Session Laws. The residents of both affected areas approved the creation of the new school districts by referendum.

On July 17, 1969, the plaintiffs filed a supplemental complaint seeking a declaratory judgment that Chapters 578 and 628 of the 1969 North Carolina Session Laws were unconstitutional and seeking an injunction against the operation of the two newly created school systems. On August 25, 1969, a temporary injunction against the operation of the two new school districts was issued by the United States District Court for the Eastern District of North Carolina. The injunction was made permanent on May 26, 1970. The Littleton-Lake Gaston School District appealed. The Warrenton City Board of Education has not appealed.

The constitutionality of the legislation creating the Littleton-Lake Gaston School District depends on whether its primary purpose is to prevent, insofar as

is possible, the dismantling of the former dual school system. *Wright* v. *Council of City of Emporia*, — F. 2d. —, No. 14552 (4th Cir. ———, 1971). Legislatures are assumed to intend the natural and reasonable effect of the legislation they enact. "In a legal sense the object or purpose of legislation is to be determined by its natural and reasonable effect. . . ." *People ex rel. Parke, Davis & Co.* v. *Roberts*, 171 U.S. 658 (1898).

Looking at effect only, and ignoring the abortive creation of the Warrenton City School district, this case is similar to *Scotland Neck* and *Emporia, supra.* Removing the students who were to attend the Littleton-Lake Gaston School District would alter the racial balance in the remaining Warren County school district by, at most, 5.5 percent, from 28 percent white, 67 percent black and 6 percent Indian, to 21.5 percent white, 72.5 percent black and 6 percent Indian.[1] There would be a substantial majority of black students in the Warren County system whether or not these students were removed. Also, paralleling *Scotland Neck* and *Emporia,* the Littleton-Lake Gaston school officials argued in the district court that the creation of the special school district was designed to remedy long standing financial difficulties and to prevent the imminent elimination of school facilities from the town of Littleton. The town of Littleton lies partly in Warren County and partly in Halifax County.

[1] The appellants and the appellees disagree on the method that should be employed to measure the effect of the removal of the students who were to attend the Littleton-Lake Gaston School District on the racial balance in Warren County. According to the appellants, the effect would have been a change in the racial balance in the remaining Warren County system of no more than 2.6 percent. Our disposition of this case does not require us to resolve this dispute.

Historically, students from both Warren County and Halifax County attended school in Littleton, although the school was officially part of the Warren County school system. The Warren County Board refused to fund the Littleton school at a level commensurate with other schools in the system arguing that Halifax County should provide support for the students from Halifax County. The Halifax County Board refused to provide funds for a school run by Warren County. Apparently as a result of this financial dilemma, the physical condition of the school building in Littleton was deteriorating. A report by the North Carolina Division of School Planning in 1965 recommended the eventual abandonment of school facilities presently in use in Littleton. Although the report did not specify where replacement facilities would be erected, the Littleton officials apparently assume that they would not be located in Littleton.

Despite these similarities, we think there are important differences that distinguish this case from *Scotland Neck* and *Emporia.* In both *Scotland Neck* and *Emporia,* the district courts specifically found that there were non-invidious purposes for the creation of the new school districts. The opinion below in this case, signed by the same two district judges who sat in *Scotland Neck,* contains no such findings. In both *Scotland Neck* and *Emporia,* the geographic boundaries of the new school districts are the previously existing boundaries of the two cities. The Littleton-Lake Gaston School District is composed of the town of Littleton, two townships in Warren County and part of a third township in Halifax County. Why U.S. 158 was selected as the southern boundary for the new school district is not satisfactorily explained. New boundary lines are suspect and require close scrutiny to assure that they are not gerrymandered for invid-

ious purposes. Although the financial difficulties of the Littleton school are of long standing and the report recommending the abandonment of the Littleton school facilities predates the creation of the Littleton-Lake Gaston School District by four years, there were no attempts by the residents of the Littleton area to obtain a separate school district prior to the time that effective integration was imminent as there were in *Scotland Neck*. Unlike *Emporia*, the residents of the Littleton area have not been deprived of their proportionate voice in the governmental affairs of Warrent County.

But we need not decide whether these differences alone are sufficient to compel a result different from the disposition of *Scotland Neck* and *Emporia*. In determining the purpose of legislation, it is appropriate to consider not only the effect of the legislation itself, but also the history and setting out of which the legislation arose. See *Poindexter* v. *Louisiana Financial Assistance Commission*, 275 F. Supp. 833 (E.D. La. 1967), aff'd per curiam, 389 U.S. 571 (1968). The adverse reaction and strong opposition to the third desegregation plan submitted by the Warren County Board of Education plainly fueled the creation of the two new school districts, Littleton-Lake Gaston and the Warrenton City Administrative Unit. The two bills creating these school districts were introduced on April 10 and 11, 1969, a day apart, and were ratified three days apart. Both were "local bills" sponsored by representatives to the North Carolina legislature from districts including Warren County. The court below focused, quite properly, on the combined effect of these two bills. The net effect of both bills would have been to reduce the number of white students in the Warrenton County school system from 1,415 (27 percent) to 260 (7 percent)—allowing more

than four out of five white students to escape the heavily black schools of Warren County.[2] The finding of the district court that the primary purpose of the legislation was to carve out a refuge for white students and preserve to the extent possible segregated schools in Warren County is supported by substantial evidence, and indeed, is inescapable. Accordingly, we affirm the judgment of the district court enjoining the establishment of the Littleton-Lake Gaston School District.

Affirmed.

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[2] These figures include the net effect of transfer plans adopted by both the Littleton-Lake Gaston School District and the Warrenton City Board of Education. In *Scotland Neck* we concluded that the effect of a transfer plan adopted by the Scotland Neck Board of Education had no relevance to the question of the constitutionality of the legislation creating the Scotland Neck school district because there was nothing in the record to suggest that the legislature was aware that Scotland Neck would adopt a transfer plan. In this case, however, such evidence does appear in the record. The school facilities in Warrenton had a capacity of 1,000 to 1,200 students but the Warrenton City Unit contained only 206 resident students. The district court found that Warren County could not accommodate its present students without utilizing the surplus space in Warrenton and that Warrenton could not maintain acceptable educational standards in a 12-grade school system containing only 200 students. Thus, Warrenton could not operate a separate school system without a substantial number of students transferring from the county. In addition, there was direct testimony by State Senator Julian Allsbrock, one of the sponsors of the Littleton-Lake Gaston bill, that there was some discussion of students transferring into the Littleton-Lake Gaston School District while the bill was pending. Volume III, Record on Appeal, Transcript of Hearing at Raleigh, North Carolina, December 17, 1969, at 23, 59.

Memorandum Opinion of District Court

[Filed March 2, 1970]

MERHIGE, District Judge.

The plaintiffs in this action filed a supplemental complaint on August 1, 1969, alleging that the added defendants, the City Council and the School Board of the City of Emporia, had taken steps to establish a city school system independent of the Greensville County system, then under a desegregation order in this suit. Emporia, a city of the second class since 1967, is surrounded by Greensville County. Through the school year 1968-69 public school pupils resident in Emporia had attended schools operated by Greensville County; the city had been reimbursing the county for this service under a contract of April 10, 1968.

On August 8, 1969, the added defendants were temporarily enjoined by this Court from any steps which would impede the implementation of the outstanding desegregation order. Subsequently the Emporia officials answered, denying the allegation that the plan for separation would frustrate the efforts of the Greensville County School Board to implement the plan embraced by the Court's order. The matter was then continued until December 18, 1969, for a hearing on whether the injunction should be made permanent.

The original action seeking relief from alleged racial discrimination in the operation of the Greensville County School System, was filed in March of 1965. Emporia was not a city under Virginia law until July 31, 1967; until that time the county was alone responsible for the public education of those within its borders. Under the contract of April 10, 1968, the county continued this service in exchange for the payment of 34.26% of the cost of the system.

On June 21, 1968, the plaintiffs moved for additional relief. Up to that point the county-administered system had operated under a free-choice plan which, plaintiffs asserted, had not achieved constitutional compliance under Green v. County School Board of New Kent County, 391 U.S. 480, 88 S.Ct. 1969, 20 L.Ed.2d 716 (1968). The 1967-68 enrollment figures show the racial distribution then prevailing:

	Students		*Faculty*	
School	*W*	*N*	*W*	*N*
Greensville County High	719	50	39½	1
Emporia Elementary	857	46	34½	2
Wyatt High	0	809	4½	32½
Moton Elementary	0	552	0	22½
Zion Elementary	0	255	1	12½
Belfield Elementary	0	419	3	14
Greensville County Training	0	439	0	16

The two schools then attended by all the white students were and still are in the city of Emporia, as is the training school; others are in the county.

The county proposed the extension of the free choice plan for another year while a zoning or pairing plan was developed. The plaintiffs took exception. The Court ordered the county to file a pupil desegregation plan bringing the system into compliance with *Green* by January 20, 1969. The county again proposed that the free choice plan be retained with certain changes, principally involving transfers out of a pupil's regular school for special classes and faculty reassignment. As an alternative, if the first proposal were rejected, the county suggested a plan under which the high school population would be divided between the two facilities on the basis of curriculum pursued, academic or vocational. Faculties would be reassigned to achieve at least a

75%-25% ratio in each school. Elementary school desegregation would be achieved by the transfer of individual Negroes to white schools "on the basis of standardized testing of all students."

The plaintiffs suggested the assignment of all students on the basis of grades attained to specific schools; pairing, in other words, the entire system. Elementary teachers were to follow their classes as reassigned, and high school teachers were to be shifted so that the racial balance in the Wyatt School and Greensville County High would be approximately the same.

A hearing was held on June 17, 1969, and this Court stated its findings and indicated its intention to order that the plaintiffs' plan be adopted.

By order of June 25, 1969, this Court rejected the defendants' proposals and ordered the plaintiffs' plan put into effect. Subsequently the plan was modified slightly on defendants' motion; the pupil assignments ordered on July 30, 1969, were as follows:

School	*Grades*
Greensville County High	10, 11, 12
Junior High (Wyatt)	8, 9
Zion Elementary	7
Belfield Elementary	5, 6
Moton Elementary	4, 5
Emporia Elementary	1, 2, 3
Greensville County Training	Special Education

On July 9, 1969, the city council met especially to formulate plans for a city school system. On July 10th the mayor sought the cooperation of county officials in selling or leasing school facilities located in Emporia. On July 14th the council instructed the city school board to take steps to create a city school division. On July 23rd the council

requested the state board of education to authorize the establishment of such a division, which request has been tabled by the State Board "in light of matters pending in the federal court," defendants' Ex. E-1. The Emporia school board in the meantime advised the county officials that the contract would no longer be honored and that city pupils would not attend the county system in the forthcoming school year. A notice of July 31, 1969, published by the city school board, required that school age children resident in Emporia be registered and invited applications from non-residents on a tuition basis. The injunction of August 8, 1969, however, resulted in a continuation of city pupils attending the county system for the present school year.

At a hearing on December 18, 1969, the city took the position that the contract was void under state law (see defendants' Ex. E-J); this question is the subject of pending litigation brought by the city on October 1, 1969, in the state courts. The evidence shows that the city on September 30, 1969, notified the county of its view that the contract is invalid and its intention to terminate the contract under its terms, in any case, effective in July, 1971. Payments, however, were continued through the date of the December hearing. Emporia officials also have assured the Court that they have no intention of entertaining applications from nonresidents until so permitted by this Court.

At the hearing the county, unfortunately, took no position.

A resolution of the city school board of December 10, 1969, defendants' Ex. E-F, outlines the city's plan. Elementary levels through grade six would be conducted in the Emporia Elementary School building; grades seven through twelve would be housed in the Greensville County High School. Defendants' Ex. E-G includes budgetary

projections for the new system. The city projects enrollment figures for the system at about ten percent above the number of city residents now in the public system "on the expectation that some pupils now attending other schools would return to a city-operated school system," defendants' Ex. E-F, at 1.

The city clearly contemplates a superior quality educational program. It is anticipated that the cost will be such as to require higher tax payments by city residents. A kindergarten program, ungraded primary levels, health services, adult education, and a low pupil-teacher ratio are included in the plan, defendants' Ex. E-G, at 7, 8.

The county has filed, at the Court's request, a statistical breakdown of the students and faculty in the county-administered schools, now in operation under this Court's order of July 30, 1969. The table below shows the current racial makeup of the seven schools:

School	*Students*		*Faculty*	
	W	*N*	*W*	*N*
Emporia Elementary	283	655	17	18
Grades 1–3	30.1%	69.9%		
Hicksford (Moton)	238	405	11	13
Grades 4–5	37%	63%		
Belfield	107	243	7	11
Grade 6	30.6%	69.4%		
Zion	127	238	7	7
Grade 7	34.8%	65.2%		
Junior High	215	443	19	21
Grades 8-9	32.6%	67.4%		
Senior High	346	424	31	14
Grades 10-12	44.9%	55.1%		
Training School	10	63	1	8
	13.7%	86.3%		

By comparison, the county reported the following racial characteristics for the 1968–69 school year:

School	*Students*		*Faculty*	
	W	*N*	*W*	*N*
Greensville County High	720	45	39	1
Wyatt H.S. (present Jr. High)	0	829	5	34
Emporia Elementary	771	53	33	3
Moton (present Hicksford)	0	521	5	18
Zion	0	248	1	13
Greensville County Training	0	387	0	17
Belfield	0	427	2	16

The procedural status of the case at present needs clarification. The plaintiffs contend that no one has made application to this Court that its order of June 25, as modified on July 30, be amended. This is the outstanding desegregation order addressed to "the defendants herein, their successors, agents. and employees." They contend that this Court is therefore limited to the inquiry whether the city officials threaten to interfere with the implementation of the order and therefore should be permanently enjoined.

Some passages in the city officials' briefs support this contention. In their rebuttal brief they state that the city is not seeking any sort of judicial relief excepting that the injunction of August 8, 1969, be lifted. They contend that any change in the existing desegregation order would be "a matter to be resolved by the Court, the plaintiffs and Greensville County, and would not involve the city." [Rebuttal brief of January 23, at 3.] Such a position, however, is inconsistent with that taken by counsel at the December 18th hearing. Issues explored went beyond the question whether the city's initiation of its own system would necessarily clash with the administration of the

existing pairing plan; indeed there seems to be no real dispute that this is so. The parties went on to litigate the merits of the city's plan, developing the facts in detail with the help of an expert educator. Counsel for the city stated that "at the conclusion of the evidence today, we will ask Your Honor to approve the assignment plan for the 1970-71 school year and to dissolve the injunction now, against the city, effective at the end of this school year," Tr., Dec. 18, at 11.

It seems clear that the supplemental complaint sought to join the city officials not so much as successors, in full or in part, to the official powers and interests of the original defendants, but rather as persons who intended to use state powers to interfere with the plaintiffs' enjoyment of their constitutional right to unsegregated public education. Ample precedent exists for authority to grant relief in such a case. Faubus v. United States, 254 F.2d 797 (8th Cir., 1958); Lee v. Macon County Board of Education, 231 F.Supp. 743 (M.D.Ala. 1964). Indeed such orders have issued against private parties, on occasion, even at the instance of state officials, Kasper v. Brittain, 245 F.2d 92 (6th Cir. 1957); Brewer v. Hoxie School District No. 46, 238 F.2d 91 (8th Cir. 1956). Plaintiffs did not specifically request then or since that the city officials be joined or substituted as parties defendant pursuant to Fed.Rules Civ.Proc., Rule 25(c), or Rule 25(d), 28 U.S.C.

Nevertheless, this Court has concluded that the plaintiffs' failure to so move was, under the circumstances, excusable and indeed unnecessary. The city defendants, by their actions, have made it clear that, according to state law, they have succeeded to the powers of the county board members over public school students resident in the city. They now desire to exercise these latent powers and have asked this Court to amend its orders to enable them to so do. A word about the Virginia education law aids in understanding this aspect of the case.

When Emporia became a city the duty fell upon it to establish a school board to supervise public education in the city. §§ 22-2, 22-93, 22-97, Va.Code Ann., 1950. State law permits, however, the consolidation of a city with a county to form a single school division, with the approval of the State Board of Education, § 22-30, Va.Code Ann., 1950. In such a case a single school board may be established with the approval of both governmental units. § 22-100.2, Va.Code Ann., 1950; the individual boards would then cease to exist, § 22-100.11, Va.Code Ann., 1950. Alternatively, the two boards might remain in existence and meet jointly to choose a division superintendent, § 22-34, Va.Code Ann., 1950. There is provision as well for the establishment of jointly owned schools, § 22-7, Va.Code Ann., 1950. When a city contracts with a county for the provision of school services, moreover, there is specific provision that the county board shall include representatives of the city, § 22-99, Va.Code Ann., 1950. Therefore, once it became a city, there is no doubt that Emporia succeeded to the state-law powers and duties of actively administering public schools for its residents under one of these statutory schemes. It has not, however, until recently sought to exercise that power. Only after the June order did the city move to assume the powers that it had, by contract, delegated to the county, plaintiffs' exhibit 12.

Under federal practice, an injunction may not issue against and bind all the world. The persons whose conduct is governable by court order are defined by rule:

> Every order granting an injunction * * * is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by per-

sonal service or otherwise. Fed. Rules Civ.Proc., Rule 65(d), 28 U.S.C.

This rule fixes the scope of valid orders, and terms in a decree exceeding the rule are of no effect, Swetland v. Curry, 188 F.2d 841 (6th Cir. 1951); Alemite Mfg. Co. v. Staff, 42 F.2d 832 (2d Cir. 1930); Baltz v. The Fair, 178 F.Supp. 691 (N.D. Ill. 1959); Chisolm v. Caines, 147 F.Supp. 188 (E.D.S.C. 1954). In general, only those acting in concert with, or aiding or abetting, a party can be held in contempt for violating a court order. One whose interest is independent of that of a party and who is not availed of as a mere device for circumventing a decree is not subject to such sanctions, United Pharmacal Corp. v. United States, 306 F.2d 515, 97 A.L.R.2d 485 (1st Cir. 1962). The law exposes to summary punishment only those who have already had their rights adjudicated in court. Consistent with these limitations, a court will only order a public official to perform or refrain from certain acts which are within the powers conferred upon him by law, Bell v. School Board of Powhatan County, 321 F.2d 494 (4th Cir. 1963), and will deny relief when those parties before it are not fully empowered, under state law, to take the action requested, Thaxton v. Vaughan, 321 F.2d 474 (4th Cir. 1963).

Under these precedents one might conclude that, because the city officials were not parties to any of the proceedings in this case prior to the filing of the supplemental complaint, they are therefore not bound by decrees in that litigation. But a line of cases involving public officers has also evolved holding that a decree may bind one who succeeds to the powers exercised by the officer who was a party to the original suit. In Regal Knitwear Co. v. N. L. R. B., 324 U.S. 9, 65 S.Ct. 478, 89 L.Ed. 661 (1945), the Supreme Court recognized that a decree might bind "successors" to a private litigant, at least if they came within

the usual "privity" doctrines. Lucy v. Adams, 224 F.Supp. 79 (N.D.Ala.1963), held that the successor to a state university dean of admissions was bound by a decree against his predecessor so long as he had notice of the injunction. In Lankford v. Gelston, 364 F.2d 197, 205 n. 9 (4th Cir. 1966), an injunction against a police official or his successor was expressly endorsed. The injunction of June 25, 1969, as mentioned above, issued against the county officials or their successors. No one contests that the city officers had notice of the decree. The Emporia officials in a very real sense appear now to have succeeded, under state law, to the part of the county officers' powers and thus are amenable to the decree.

It is irrelevant that the city officials hold positions that differ in name from those of the original parties. Substitution in analogous situations has been effectuated under Fed. Rules Civ. Proc. Rule 25(d) 28 U.S.C., when the relevant functions have been moved from one office to another, Fleming v. Mohawk Wrecking & Lumber Co., 331 U.S. 111, 67 S.Ct. 1129, 91 L.Ed. 1375 (1947); Toshio Joji v. Clark, 11 F.R.D. 253 (N.D.Cal.1951); Porter v. American Distilling Co., 71 F.Supp. 483 (S.D.N.Y. 1947), cf. Skolnick v. Parsons, 397 F.2d 523 (7th Cir. 1968).

The city might have moved for substitution under Fed. Rules Civ. Proc., Rule 25(d), but its failure to do so is quite excusable. The county officials were under contract to operate the schools, and the question of the validity of that instrument was not raised. Greensville County officials were in possession of the schools whereas the city board was by all indications asserting no control. The county board, when ordered to take certain steps in the exercise of its power over the public school pupils of the city and the county, did not protest its lack of power. It may yet possess power over both city and county residents, at least for the term of the contract. But the city's actions subsequent to

the pairing decree, and in particular the pending suit to declare the contract void, cast great doubt on the county's authority under state law. To all appearances the city board, but for and subject to the decree of this Court ordering non-interference, now has the power under state law to administer schools for the city residents. Certainly it must have such power, even if the contract is valid, commencing July 1, 1971.

As a successor in interest to a party to the original decree, it would seem that the city school board now has sufficient standing under Fed.Rules Civ.Proc., Rule 60(b), 28 U.S.C., to move to amend the outstanding decree. Those cases holding such relief to be unavailable to nonparties concern chiefly the applications of persons who did not have an interest in the judgment identical to that of the original party, Mobay Chemical Co. v. Hudson Foam Plastics Corp., 277 F.Supp. 413 (S.D.N.Y. 1967); United States v. 140.80 Acres of Land, 32 F.R.D. 11 (E.D.La. 1963); United States v. International Boxing Club, 178 F.Supp. 469 (S.D.N.Y.1959). The present standing of the city board members is still problematical because the validity of the contract has not been finally adjudicated. But it is clear that they will enjoy the relevant powers at least in the 1971-1972 school year, and sooner if they succeed in their litigation; this puts them in a position to move to modify the decree.

The Court therefore must proceed to the merits of the city's plan, treating the school board's application, as discussed above, as a motion under Fed.Rules Civ.Proc., Rule 60(b), 28 U.S.C.

The county board has provided data on the composition of the student body of each school as currently operated, broken down by race and by place of residence. The tables below are based upon that information:

Overall System, September 1, 1969
Students by race and residence:

	White	*Negro*	*Total*	*% White*	*% Negro*
County:	728	1888	2616	27.8%	72.2%
City:	543	580	1123	48.3%	51.7%
Total	1282	2477	3759	34.1%	65.9%[1]

The establishment of separate systems would plainly cause a substantial shift in the racial balance The two schools in the city, formerly all-white schools, would have about a 50-50 racial makeup, while the formerly all-Negro schools located in the county which, under the city's plan, would constitute the county system, would overall have about three Negro students to each white. As mentioned before, the city anticipates as well that a number of students would return to city system from private schools. These may be assumed to be white, and such returnees would accentuate the shift in proportions.

The city contemplates placing grades one through six in the Emporia Elementary School building. Such a school would have 314 Negro students and 270 white; 46.2% white and 53.8% Negro. A city high school incorporating grades seven through twelve would have 252 Negro students and 271 white; this would make for a ratio of 51.8% white to 48.2% Negro pupils.

[1] Figures secured from Greensville County school system; total students include 11 white and 9 Negro, who apparently reside outside both county and city.

The impact of separation in the county would likewise be substantial. The distribution of county residents, by grade and race, is as follows:

	White	*Negro*
Grades 1-3	167—26.3%	468—73.7%
Grades 4-5	142—31.1%	314—68.9%
Grade 6	57—23.5%	185—76.5%
Grades 7-9	192—27.5%	506—72.5%
Grades 10-12	161—30.6%	365—69.4%

These figures should be compared with the current percentages reported by the county, given in a table above. At each level the proportion of white pupils falls by about four to seven percent; at the high school level the drop is much sharper still.

The motives of the city officials are, of course, mixed. Ever since Emporia became a city consideration has been given to the establishment of a separate city system. A second choice was some form of joint operating arrangement with the county, but this the county would not assent to. Only when served with an "ultimatum" in March of 1968, to the effect that city students would be denied access to county schools unless the city and county came to some agreement, was the contract of April 10, 1968, entered into. Not until June of 1969 was the city advised by counsel that the contract was, in all probability, void under state law. The city then took steps to have the contract declared void and in any event to terminate it as soon as possible.

Emporia's position, reduced to its utmost simplicity, was to the effect that the city leaders had come to the conclusion that the county officials, and in particular the board of supervisors, lacked the inclination to make the court-ordered unitary plan work. The city's evidence was to the effect that increased transportation expenditures would have to be

made under the existing plan, and other additional costs would have to be incurred in order to preserve quality in the unitary system. The city's evidence, uncontradicted, was to the effect that the board of supervisors, in their opinion, would not be willing to provide the necessary funds.

While it is unfortunate that the county chose to take no position on the instant issue, the Court recognizes the city's evidence in this regard to be conclusions; and without in any way impugning the sincerity of the respective witnesses' conclusions, this Court is not willing to accept these conclusions as factual simply because they stand uncontradicted. Assuming arguendo, however, that the conclusions aforementioned are indeed valid, then it would appear that the Court ought to be extremely cautious before permitting any steps to be taken which would make the successful operation of the unitary plan even more unlikely.

The Court does find as a fact that the desire of the city leaders, coupled with their obvious leadership ability, is and will be an important facet in the successful operation of any court-ordered plan.

Dr. Tracey, a professor of education at Columbia University, felt that the county budget had not even been increased sufficiently to keep up with inflation in the 1969-1970 year, and that it seemed that certain cutbacks had been made in educational programs, mainly to pay for increased transportation costs. In Dr. Tracey's opinion the city's projected budget, including higher salaries for teachers, a lower pupil-teacher ratio, kindergarten, ungraded primary schooling, added health services, and vocational education, will provide a substantially superior school system. He stated that the smaller city system would not allow a high school of optimum size, however. Moreover, the division of the existing system would cut off county pupils from exposure to a somewhat more urban society. In his opinion as an educator, given community support for the programs he

envisioned, it would be more desirable to apply them throughout the existing system than in the city alone.

While the city has represented to the Court that in the operation of any separate school system they would not seek to hire members of the teaching staff now teaching in the county schools, the Court does find as a fact that many of the system's school teachers live within the geographical boundaries of the city of Emporia. Any separate school system would undoubtedly have some effect on the teaching staffs of the present system.

Dr. Tracey testified that his studies concerning a possible separate system were conducted on the understanding that it was not the intent of the city people to "resegregate" or avoid integration. The Court finds that, in a sense, race was a factor in the city's decision to secede. This Court is satisfied that the city, if permitted, will operate its own system on a unitary basis. But this does not exclude the possibility that the act of division itself might have foreseeable consequences that this Court ought not to permit. Mr. Lankford, chairman of the city school board, stated:

> Race, of course, affected the operation of the schools by the county, and I again say, I do not think, or we felt that the county was not capable of putting the monies in and the effort and the leadership into a system that would effectively make a unitary system work * * *, Tr.Dec. 18, at 28.

Mr. Lankford stated as well that city officials wanted a system which would attract residents of Emporia and "hold the people in public school education, rather than drive them into a private school * * *," Tr.Dec. 18, at 28.

Under Monroe v. Board of Commissioners, 391 U.S. 450, 88 S.Ct. 1700, 20 L.Ed.2d 733 (1968), and under principles derived from Brown v. Board of Education, 347 U.S.

483, 74 S.Ct. 686, 98 L.Ed. 873 (1954), federal courts cannot permit delay or modification in plans for the dismantling of dual school systems for the purpose of making the public system more palatable to some residents, in the hopes that their flight to private schools might be abated. The inevitable consequence of the withdrawal of the city from the existing system would be a substantial increase in the proportion of whites in the schools attended by city residents, and a concomitant decrease in the county schools. The county officials, according to testimony which they have permitted to stand unrebutted, do not embrace the court-ordered unitary plan with enthusiasm. If secession occurs now, some 1,888 Negro county residents must look to this system alone for their education, while it may be anticipated that the proportion of whites in county schools may drop as those who can register in private academies. This Court is most concerned about the possible adverse impact of secession on the effort, under Court direction, to provide a unitary system to the entire class of plaintiffs. This is not to say that the division of existing school administration areas, while under desegregation decree, is impermissible. But this Court must withhold approval "if it cannot be shown that such a plan will further rather than delay conversion to a unitary, nonracial, nondiscriminatory school system," Monroe v. Board of Commissioners, supra, 391 U.S. 459, 88 S.Ct. 1705. As a court of equity charged with the duty of continuing jurisdiction to the end that there is achieved a successful dismantling of a legally imposed dual system, this Court cannot approve the proposed change.

This Court's conclusion is buttressed by that of the district court in Burleson v. County Board of Election Commissioners, 308 F.Supp. 352 (E.D.Ark., Jan. 22, 1970). There, a section of a school district geographically separate from the main portion of the district and populated princi-

pally by whites was enjoined from seceding while desegregation was in progress. The Court so ruled not principally because the section's withdrawal was unconstitutionally motivated, although the Court did find that the possibility of a lower Negro population in the schools was "a powerful selling point," Burleson v. County Board of Election Commissioners, supra, 308 F.Supp. 357. Rather, it held that separation was barred where the impact on the remaining students' right to attend fully integrated schools would be substantial, both due to the loss of financial support and the loss of a substantial proportion of white students. This is such a case.

If Emporia desires to operate a quality school system for city students, it may still be able to do so if it presents a plan not having such an impact upon the rest of the area now under order. The contractual arrangement is ended, or soon will be. Emporia may be able to arrive at a system of joint schools, within Virginia law, giving the city more control over the education its pupils receive. Perhaps, too, a separate system might be devised which does not so prejudice the prospects for unitary schools for county as well as city residents. This Court is not without the power to modify the outstanding decree, for good cause shown, if its prospective application seems inequitable.

District Court's Findings of Fact and Conclusions of Law

[Filed on August 8, 1969]

This cause came on to be heard on the verified supplemental complaint and the plaintiffs' motion for an interlocutory injunction as prayed in the supplemental complaint; and having heard oral evidence and received exhibits in open court, the Court makes the following

Findings of Fact

This action, seeking the racial desegregation of the public school system of Greensville County, was commenced March 15, 1965.

On July 31, 1967, the Town of Emporia became a city of the second class known as the City of Emporia.

In recognition of its obligation to provide certain services and facilities including public schools for children within its boundaries, the said City by the Council thereof on April 10, 1968 entered into and signed an agreement with the surrounding County of Greensville acting through the Board of Supervisors thereof, whereby the County would continue to provide public schools to the citizens of the City of Emporia in the same manner as when the City was a town and to the same extent as provided to the citizens of the County, and the City would pay as billed its contractual share, ascertained at 34.26 percentum, of the local cost to the County. Said agreement provides for its continuing effectiveness for a period of four years and thereafter until notice will be given by either party to the other by December 1 of any year that said agreement would be terminated on July 1 of the second year following such notice. The contract provides for other contingencies in reference to termination.

On June 17, 1969, this Court stated from the bench its findings of fact and conclusions of law regarding the plaintiffs' motion for further relief and indicated that an order would be entered requiring the County School Board of Greensville County to implement the plan for desegregation filed by the plaintiffs which proposed the use of two school buildings located near but outside the City limits for all children in primary and lower elementary grades living south of the Meherrin River, the use of a school building located within the City and one located near but outside the City limits for all children in primary and lower elementary grades living north of the Meherrin River, the assignment of all pupils in intermediate grades to Emporia Elementary School located within the City of Emporia, the assignment of all pupils in the junior high school grades to Wyatt High School located near but outside the City limits, and the assignment of all pupils in the senior high school grades to Greensville County High School located within the City limits. The only two schools in the system which white children have ever attended are within the City.

On June 24, 1969, Bruce Lee Townsend, an infant, etc., et al, residents of the City of Emporia, filed in the Circuit Court of the County of Greensville a petition (which on the same day was served on the respondents thereof, viz: City Council of City of Emporia, School Board of City of Emporia, Greensville County Board of Supervisors, and Greensville County School Board) seeking, *inter alia*, judicial dissolution of the above mentioned agreement of April 10, 1968, and an injunction preventing any pupils residing within the City from being assigned to schools not located within the City. Each of the respondents demurred to said petition on July 15, 1969.

On July 9, 1969, William H. Ligon, L. R. Brothers, Jr., T. Cato Tillar, Fred A. Morgan, Julian C. Watkins, S. G. Keedwell, M. L. Nicholson, Jr., and Robert F. Hutcheson,

constituting the Council of the City of Emporia; George F. Lee, Mayor of the City; D. Dortch Warriner, City Attorney; and Robert K. McCord, City Manager, convened in a special meeting, the purpose of which was for "establishing a City School system."

Under date of July 10, the Mayor sought cooperation from the County Board of Supervisors, specifically the sale or lease of the school buildings located within the City.

At the July 14 meeting of the same City officials, the Mayor evidenced his dissatisfaction with the plan which this Court had ordered to be executed to accomplish school desegregation. The Council heard purported percentages of Negroes who would be in each school for the first seven grades under the plan approved by this Court, and there was evidenced a view that the plan was educationally unsound. The chairman of the City School Board advised the Council that approximately 500 County children could attend City schools if the City obtained the buildings wanted, i.e., the Emporia Elementary School and the Greensville County High School which white children of the County and City have traditionally attended. The Council unanimously decided to instruct the School Board of the City of Emporia to immediately take all steps to establish a school division for the City of Emporia.

At a special meeting held July 23, 1969, the Council adopted a resolution requesting the State Board of Education to authorize the creation of a school division for the City of Emporia.

The City School Board notified the County School Board that a separate school system for the City will be operated, that no City school children will attend the County system during the year 1969-70 and thereafter, and that the City would no longer pay a share of the cost of operating the County schools. The notification solicited the cooperation of the County School Board in making this transition which

was characterized as being "for the benefit of the entire community."

The City School Board has caused to be circulated and posted a notice dated July 31, 1969, requiring all parents of school age children residing in the City to register such chidren during the week of August 4-8 and inviting applications from out-of-city students who desire to attend Emporia City schools on a tuition, no transportation basis.

The City School Board's proposed operation of the schools would afford those students residing in the County the opportunity to attend a City school upon payment of certain tuition fees.

Certain members of the County School Board and members of the Board of Supervisors had knowledge of the foregoing events as and when they occurred and have met with members or representatives of the City Council and of the City School Board and discussed the plans of the City to withdraw from the County school system.

The Court further finds that a failure of this Court to enjoin the defendants would result in incalculable harm to those students residing in the County and would be disruptive to the effectiveness of the Court's previous order.

The Court further finds that the members of the School Board of Emporia have not functioned as such except for the purpose of consulting with the County Board in the selection of a superintendent of schools. They never acted in any manner for purposes of offering their assistance to the County Board in reference to a school plan to be submitted to this Court.

On the basis of the foregoing, the Court makes the following

Conclusions of Law

1. As a successor to the County School Board with respect to the duty to educate children of school age residing

in the City of Emporia, the City School Board would be and is bound by this Court's order requiring the County School Board to disestablish racial segregation in the public school system which it controlled and operated both when this suit was commenced and when said order was entered and to do so in accordance with the plan approved by this Court.

2. As persons in participation with the County School Board with respect to the cost of the school system, and they having received notice of this Court's said order, the Council of the City of Emporia, the members thereof, the Mayor of the City, the School Board of the City of Emporia, the members thereof, the County Board of Supervisors of Greensville County and the members thereof were and are bound by this Court's said order.

3. The establishment and operation of a separate public school system by the City of Emporia and the consequent withdrawal of children residing in that City from the public school system of Greensville County would be an impermissible interference with and frustration of this Court's said order.

4. The Council of the City of Emporia may not withhold its appropriate share of financial support for the operation of public schools by the County School Board of Greensville County when such would defeat or impair, the effectuation of the constitutional rights of the plaintiffs in the manner which this Court has directed.

Dated: 8-8-69

/s/ Robert R. Merhige, Jr.
United States District Judge

Order of District Court

[Entered and Filed on August 8, 1969]

For the reasons assigned in the Court's Findings of Fact and the Conclusions of Law, and deeming it proper so to do, it is ADJUDGED, ORDERED and DECREED that the School Board of the City of Emporia and the members thereof, viz: E. V. Lankford, Julian P. Mitchell, P. S. Taylor and G. B. Ligon, and their successors, and the officers, agents, servants, employees and attorneys of said Board, as well as George F. Lee, as Mayor of the City of Emporia, and his successors, and the Council of the City of Emporia and the members thereof, viz: William H. Ligon, L. R. Brothers, Jr., T. Cato Tillar, Fred A. Morgan, Julian C. Watkins, S. G. Keedwell, M. L. Nicholson, Jr., and Robert F. Hutcheson, and their successors, and the officers, agents, servants, employees and attorneys of said Council, be, and they hereby are, enjoined and restrained from any action which would interfere in any manner whatsoever with the implementation of the Court's order heretofore entered in reference to the operation of public schools for the student population of Greensville County and the City of Emporia.

This order shall be effective upon the plaintiffs' giving security in the sum of $100.00 for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined; and shall remain in full force and effect for a period of 140 days unless sooner modified, enlarged or dissolved.

Let the United States Marshal serve copies of this order upon each of the named defendants.

Dated: August 8, 1969
3:45 P.M.

/s/ ROBERT R. MERHIGE, JR.
United States District Judge

Va. Code Ann.

§ 22-7. *Joint schools for counties or for counties and cities or towns.*—The school boards of counties or of counties and cities, or of counties and towns operating as separate special school districts, may, with the consent of the State Board, establish joint schools for the use of such counties or of such counties and cities or of counties and towns operating as separate special school districts, and may purchase, take, hold, lease, convey and condemn, jointly, property, both real and personal, for such joint schools. Such school boards, acting jointly, shall have the same power of condemnation as county school boards except that such land so condemned shall not be in excess of thirty acres in a county or city for the use of any one joint school. The title of all such property acquired for such purposes shall vest jointly in such school boards of the counties or counties and cities or counties and towns operating as separate special school districts in such respective proportions as such school boards may determine, and such schools shall be managed and controlled by the boards jointly, in accordance with such rules and regulations as are promulgated by the State Board. However, such rules and regulations in force at the time of the adoption of a plan for the operation of a joint school shall not be changed for such joint school by the State Board without the approval of the local school boards.

§ 22-30. *How division made.*—The State Board shall divide the State into appropriate school divisions, in the discretion of the Board, comprising not less than one county or city each, but no county or city shall be divided in the formation of such division.

§ 22-34. *When school boards to meet jointly to appoint superintendent.*—When a school division is composed of a city and one or more counties, or two or more counties, the school boards composing the division must meet jointly and a majority vote of the members present shall be required to elect a superintendent.

§ 22-42. *Counties and magisterial districts as school districts.*—Each magisterial district shall, except where otherwise provided by law, constitute a separate school district for the purpose of representation. For all other school purposes, including taxation, management, control and operation, unless otherwise provided by law, the county shall be the unit; and the school affairs of each county shall be managed as if the county constituted but one school district; provided, however, that nothing in this section shall be construed to prohibit the levying of a district tax in any district or districts sufficient to pay any indebtedness, of whatsoever kind, including the interest thereon, heretofore or hereafter incurred by or on behalf of any district or districts for school purposes.

County School Boards Generally

§ 22-61. *How school board appointed; assignment of duties.*—The county school board shall consist of one member from each school district in the county, and in any county having a population not less than eighteen thousand and not more than twenty thousand and in any county having a population not less than thirty-three thousand and not more than thirty-five thousand, if the governing body thereof so adopts by resolution, not more than two members at large, and in any county having a population of more than forty thousand but less than forty thousand four hundred, one member at large, and in any county

having a population of more than thirteen thousand but less than thirteen thousand five hundred, one member at large, all appointed by the school trustee electoral board, provided that in towns constituting separate school districts and operated by a school board of three members, one of the members shall be designated annually by the town board as a member of the county school board. The members of the county school board from the several districts shall have no organization and duties except such as may be assigned to them by the school board as a whole.

§ 22-68. *Members must be residents.*—Each member of the county board at the time of his election shall be a bona fide resident of the magisterial district or town from which he is elected, and if he shall cease to be a resident of such district or town, his position on the county school board shall be deemed vacant, except in counties where magisterial districts have been abolished, in which case he may be appointed at large, but any member at large must be a bona fide resident of that county and upon his ceasing to be a resident of that county his position on the county school board shall be deemed vacant.

§ 22-72. *Powers and duties.*—The [county] school board shall have the following powers and duties:

(1) *Enforcement of school laws.*—To see that the school laws are properly explained, enforced and observed.

(2) *Rules for conduct and discipline.*—To make local regulations for the conduct of the schools and for the proper discipline of the students, which shall include their conduct going to and returning from school, but such local rules and regulations shall be in harmony with the general rules of the State Board and the statutes of this State.

(3) *Information as to conduct.*—To secure, by visitation or otherwise, as full information as possible about the conduct of the schools.

(4) *Conducting according to law.*—To take care that they are conducted according to law and with the utmost efficiency.

(5) *Payment of teachers and officers.*—To provide for the payment of teachers and other officers on the first of each month, or as soon thereafter as possible.

(6) *School buildings and equipment.*—To provide for the erecting, furnishing, and equipping of necessary school buildings and appurtenances and the maintenance thereof.

(6a). *Insurance.*—To provide for the necessary insurance on school properties against loss by fire or against such other losses as deemed necessary.

(7) *Drinking water.*—To provide for all public schools an adequate and safe supply of drinking water and see that the same is periodically tested and approved by or under the direction of the State Board of Health, either on the premises or from specimens sent to such Board.

(8) *Textbooks for indigent children.*—School boards shall provide, free of charge, such textbooks as may be necessary for indigent children attending public schools; in systems providing free textbooks, the cost of furnishing such textbooks may be paid from school operating funds or the textbook fund or such other funds as are available; in systems operating rental textbook systems, school boards shall waive rental fees, or in their discretion, may reimburse the rental textbook fund from school operating funds.

(9) *Costs and expenses.*—In general, to incur costs and expenses, but only the costs and expenses of such items as are provided for in its estimates submitted to the tax levying body without the consent of the tax levying body.

(10) *Consolidation of schools.*—To provide for the consolidation of schools whenever such procedure will contribute to the efficiency of the school system.

(11) *Other duties.*—To perform such other duties as shall be prescribed by the State Board or as are imposed by law.

Boards of Cities and Towns

§ 22-89. *Appointment and term.*—The council of each city except as otherwise provided by the city charter shall, on or before July first, nineteen hundred and thirty, appoint three trustees for each school district in such city, whose term of office shall be three years, respectively, and one of whom shall be appointed annually The first appointment hereunder shall be one for one year, one for two years, and one for three years, beginning July first, nineteen hundred and thirty, and thereafter all appointments shall be for three years. If a vacancy occurs in the office of trustee at any time during the term, the council shall fill it by appointing another for such part of the term as has not expired. Within thirty days preceding the day on which the term of such trustees shall expire by limitation, and within the like number of days preceding the day on which the term of any trustee shall expire by limitation in any subsequent year, such council shall appoint a successor to each such trustee in office, whose term shall commence when the term of predecessor shall have expired; provided, the office of any such trustee has not been abolished in redistricting the city; and, provided, that in the city of Norfolk the trustees shall be appointed in accordance with the provisions of § 22-89.1 rather than in accordance with the provisions of the city charter, and provided, further, that the common council of the city of Winchester shall select and appoint the school trustees for said city, and

that in all other respects the provisions of this section shall apply to the city of Winchester. All acts heretofore done by the school board of the city of Winchester are hereby validated.

§ 22-97. *Enumeration of powers and duties.*—The city school board shall have the following powers and duties:

(1) *Rules and regulations.*—To explain, enforce, and observe the school laws, and to make rules for the government of the schools, and for regulating the conduct of pupils going to and returning therefrom.

(2) *Method of teaching and government employed.*—To determine the studies to be pursued, the methods of teaching, the government to be employed in the schools, and the length of the school term.

(3) *Employment and control of teachers.*—To employ teachers on recommendation of the division superintendent and to dismiss them when delinquent, inefficient or in anywise unworthy of the position; provided, that no school board shall employ or pay any teacher from the public funds unless the teacher shall hold a certificate in full force, according to the provisions of §§ 22-203 to 22-206. It shall also be unlawful for the school board of any city, or any town constituting a separate school district, to employ or pay any teacher or other school employee related by consanguinity or affinity as provided in § 22-206. The exceptions and other provisions of that section shall apply to this section.

(4) *Suspension or expulsion of pupils.*—To suspend or expel pupils when the prosperity and efficiency of the school make it necessary.

(5) *Free textbooks.*—To decide what children, wishing to enter the schools of the city, are entitled by reason of

poverty of their parents or guardians to receive textbooks free of charge and to provide for supplying them accordingly.

(6) *Establishment of high and normal schools.*—To establish high and normal schools and such other schools as may, in its judgment, be necessary to the completeness and efficiency of the school system.

(7) *Census.*—To see that the census of children required in § 22-223 is taken within the proper time and in the proper manner.

(8) *Meetings of board.*—To hold regular meetings and to prescribe when and how special meetings may be called.

(9) *Meetings of people.*—To call meetings of the people of the city for consultation in regard to the school interests thereof, at which meetings the chairman or some other member of the board shall preside if present.

(10) *Schoolhouses and property.*—To provide suitable schoolhouses, with proper furniture and appliances, and to care for, manage, and control the school property of the city. For these purposes it may lease, purchase, or build such houses according to the exigencies of the city and the means at its disposal. No schoolhouse shall be contracted for or erected until the plans therefor shall have been submitted to and aproved in writing by the division superintendent of schools, and no public school shall be allowed in any building which is not in such condition and provided with such conveniences as are required by a due regard for decency and health; and when a schoolhouse appears to the division superintendent of schools to be unfit for occupancy, it shall be his duty to condemn the same, and immediately to give notice thereof, in writing, to the chairman of the school board, and thenceforth

no public school shall be held therein, nor shall any part of the State or city fund be applied to support any school in such house until the division superintendent shall certify, in writing, to the city school board that he is satisfied with the condition of such building, and with the appliances pertaining thereto.

(11) *Visiting schools.*—To visit the public free schools within the city, from time to time, and to take care that they are conducted according to law, and with the utmost efficiency.

(12) *Management and control of funds.*—To manage and control the funds of the city made available to the school board for public schools, to provide for the pay of teachers and of the clerk of the board, for the cost of providing school-houses and the appurtenances thereto and the repairs thereof, for school furniture and appliances, for necessary textbooks for indigent children attending the public free schools, and for any other expenses attending the administration of the public free school system, so far as the same is under the control or at the charge of the school officers.

(13) *Approval and payment of claims.*—To examine all claims against the school board, and when approved, to order or authorize the payment thereof. A record of such approval, order or authorization shall be made in the proceedings of the board. Payment of each claim shall be ordered or authorized by a warrant drawn on the treasurer or other officer of the city charged by law with the responsibility for the receipt, custody and disbursement of the funds made available to the school board of such city. The warrant shall be signed by the chairman or vice-chairman of the board and countersigned by the clerk or deputy clerk thereof, payable to the person or persons,

firm or corporation entitled to receive such payment. There shall be stated on the face of the warrant the purpose or service for which such payment is drawn and also that such warrant is drawn pursuant to an order entered or authority granted by the board on the ..... day of ..... The warrant may be converted into a negotiable check when the name of the bank upon which the funds stated in the warrant are drawn or by which the check is to be paid is designated upon its face and is signed by the treasurer, deputy treasurer or other officer of the city charged by law with the responsibility for the receipt, custody and disbursement of the funds of the city.

The board may, in its discretion, appoint an agent and a deputy agent to act for the agent in his absence or inability to perform this duty by resolution spread upon the record of its proceedings to examine and approve such claims and, when approved by him or his deputy to order or authorize the payment thereof. A record of such approval, order or authorization shall be made and kept with the records of the board. Payment of each such claim so examined and approved by such agent or his deputy shall be ordered or authorized by a warrant drawn on the treasurer or other officer of the city charged by law with the responsibility for the receipt, custody, and disbursement of the funds made available to the school boar the city. The warrant shall be signed by such agent or his deputy and countersigned by the clerk or deputy clerk of the board, payable to the person or persons, firm or corporation entitled to receive such payments; provided, however, that when the agent appointed by the board is the division superintendent of schools and the division superintendent and clerk is one and the same person, all such warrants shall be countersigned by the chairman or vice-chairman of the board; provided further that when

the deputy agent and deputy clerk is one and the same person the warrant shall be countersigned by either the clerk or the agent of the board. There shall be stated on the face of the warrant the purpose or service for which such payment is made and also that such warrant is drawn pursuant to authority delegated to such agent or his deputy by the board on the ..... day ..... The warrant may be converted into a negotiable check in the same manner as is prescribed herein for warrants ordered or authorized to be drawn by the school board. The board shall require such agent and his deputy to furnish the city a corporate surety bond conditioned upon the faithful performance and discharge of the duties herein assigned to each such official. The board shall fix the amount of such bond or bonds and the premium therefor shall be paid out of the funds made available to the school board of such city.

(14) *Report of expenditures and estimate of necessary funds.*—It shall be the duty of the school board of every city, once in each year, and oftener if deemed necessary, to submit to the council, in writing, a classified report of all expenditures and a classified estimate of funds deemed to be needed for the proper maintenance and growth of the public schools of the city, and to request the council to make provisions by appropriation or levy pursuant to § 22-126, for the same.

(15) *Other duties prescribed by State Board.*—To perform such other duties as shall be prescribed by the State Board or are imposed by other parts of this title.

(16) *Acquisition of land.*—City school boards shall, in general, have the same power in relation to the condemnation or purchase of land and to the vesting of title thereof, and also in relation to the title to and management of

property of any kind applicable to school purposes, whether heretofore or hereafter set apart therefor, and however set apart, whether by gift, grant, devise, or any other conveyance and from whatever source, as county school boards have in the counties, and in addition thereto, they shall have the further right and power to condemn not in excess of fifteen acres of land for any one school when necessary for school purposes, except that when dwellings or yards are invaded not more than five acres may be condemned for any one school; provided, however, that the school board of any city having a population of more than eighty-six thousand and not more than ninety thousand and any city having a population of more than seventy-five thousand but less than eighty-seven thousand, may have the right and power to condemn not in excess of forty-five acres when necessary for school purposes.

(17) *Consolidation of schools.*—To provide for the consolidation of schools whenever such procedure will contribute to the efficiency of the school system.

§ 22-99. *When city contracts with county to furnish facilities.* In the event that a city through authority granted in its charter enters into contract with the county school board of the adjacent county for furnishing public school facilities for the city where the county and city are constituted as one school system for the establishment, operation, maintenance and management of the public schools within the county and city, the school board of the county shall consist of one representative from each magisterial district of the county and each magisterial district (or ward) of the city, such incumbent to be appointed by the county school trustee electoral board, as provided by § 22-61; provided further that the members of the county school board representing the city shall be selected from a list of three citizens from each district (or ward) to be submitted by the city council of the city; any other law to the contrary notwithstanding.

Boards of Divisions Comprising Two or More Political Subdivisions

§ 22-100.1. *Single school board authorized.*—When the State Board of Education has created a school division, composed of two or more counties or one or more counties with one or more cities, the supervision of schools in any such school division may be vested in a single school board under the conditions and provisions as hereinafter set forth.

§ 22-100.2. *How board established.*—The school boards of such counties, county and city or counties and cities, comprising such school division, by a majority vote, may, with the approval of the governing bodies of such counties, or counties and cities, and the State Board of Education, establish such division school board in lieu of the school boards as at present constituted for the counties, county and city or counties and cities of such school division. Provided, however, that no such division shall be created which includes a county in which there is located a town operating as a separate school district.

§ 22-100.3. *How composed; appointment and terms of members; vacancies.*—Such division school board shall be composed of not less than six nor more than nine trustees, with an equal number of members from each county or city of the division and with a minimum board of six members, who shall be appointed by the county board of supervisors for a county and the city council for a city. Upon the creation of such school division there shall be appointed by the appropriate appointing bodies the required number of members to the division school board who shall serve until the first day of July next following the creation of

such division. Within sixty days prior to that day each appointing body shall appoint the required number of members of the division school board as follows: If there be three members, one shall be appointed for a term of two years, one for a term of three years, and one for a term of four years; if there be four members, one shall be appointed for a term of one year, one for a term of two years, one or a term of three years, and one for a term of four years. Within sixty days prior to the first day of July in each and every year thereafter there shall be appointed by the appropriate appointing body for a term of four years beginning the first day of July next following their appointment, successors to the members of the division school board for their respective counties or cities, whose terms expire on the thirtieth day of June in each such year. The exact number of trustees for a county or city shall be determined by the governing bodies concerned within the limits above provided. Any vacancy occurring in the membership of the division school board from any county or city shall be filled for the unexpired term by the appointing body of such county or city. The governing bodies concerned shall jointly select for a term of four years one person who shall be a member of the division school board only for the purpose of voting in case of an equal division of the regular members of the board on any question requiring the action of such board. Such person shall be known as the tie breaker.

If the governing bodies are not able to agree as to the person who shall be the tie breaker, then upon application by any of the governing bodies involved to a circuit court having jurisdiction over a county or city embraced in such school division, the judge thereof shall name the tie breaker and his decision shall be final.

Judgment

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 14,552

PECOLA ANNETTE WRIGHT, *et al.*,

Appellees,

v.

COUNCIL OF THE CITY OF EMPORIA AND THE MEMBERS THEREOF, AND SCHOOL BOARD OF THE CITY OF EMPORIA AND THE MEMBERS THEREOF,

Appellants.

Appeal from the United States District Court for the Eastern District of Virginia.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Virginia, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court the the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, reversed; and the case is remanded to the United States District Court for the Eastern District of Virginia, at Richmond, with instructions to dissolve the injunction; and because of the possibility that Emporia might institute a plan for transferring students into the city system from the county system resulting in resegregation, or that the hiring of teachers to serve the Emporia school system might result in segregated faculties, the district court is directed to retain jurisdiction.

/s/ SAMUEL W. PHILLIPS
Clerk